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IN THE COURT OF THE

Supreme Court of the United States

— OCTOBER TERM, 1943 —

No. 26

IRENE BRADY, ADMINISTRATRIX OF THE
ESTATE OF EARLE A. BRADY, DECEASED,
PETITIONER,

vs.

SOUTHERN RAILWAY COMPANY

ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE
OF NORTH CAROLINA

PETITION FOR HABEAS CORPUS FILED MARCH 15, 1942.

HABEAS CORPUS GRANTED MAY 2, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

**IN SUPERIOR COURT OF GUILFORD COUNTY,
NORTH CAROLINA**

IRENE BRADY, Administratrix of the Estate of EARLE A.
BRADY, Deceased,

v.

SOUTHERN RAILWAY COMPANY

NOTE RE SUMMONS AND RETURN

Summons dated July 26, 1939, showing service July 27, 1939, appears in the original transcript of appeal.

COMPLAINT

The plaintiff, complaining of the defendant, alleges:

1. That the defendant, Southern Railway Company, is and was at the times herein complained of a corporation duly chartered under the laws of the State of Virginia, engaged in the business of a common carrier of freight and passengers for hire.

2. That Earle A. Brady, late of the County of Guilford and State of North Carolina, died intestate at Hurt, Virginia, on the 25th day of December 1938.

3. That on the 26th day of January 1939, the plaintiff, [fol. 2] Irene Brady, was appointed administratrix of the estate of the said Earle A. Brady by the Clerk of the Superior Court of Guilford County; that she qualified as such administratrix and is now the personal representative of the late Earle A. Brady, deceased.

4. That on the 25th day of December 1938, and for some years prior thereto, the defendant owned a right-of-way, together with a railway line leading from Altavista, Virginia, through Hurt, Virginia, and on to Greensboro, North Carolina, and points South; that the tracks and right-of-way at Hurt, Virginia, are in what is known as the Danville Division of the Southern Railway System.

5. That on said 25th day of December 1938, the defendant owned and maintained on its right-of-way at Hurt, Virginia,

its northbound and southbound railway main lines, together with a certain pass track or storage track; that said pass track was and is just east of the defendant's northbound main line and was and is connected therewith by switches at each end of said pass track; that at a few feet south of the switch at the north end of said pass track there was and still is located and maintained by the defendant a certain device known as a derail.

6. That on the 25th day of December 1938, at the time and place of the death of the plaintiff's intestate, the defendant was engaged in interstate commerce.

7. That on the 25th day of December 1938, plaintiff's intestate was an employee of the defendant, and while so employed was injured and killed when the freight car upon which he was riding was derailed at Hurt, Virginia.

8. That on the said 25th day of December 1938, at the time and place of the death of plaintiff's intestate, he was employed by the defendant in interstate commerce and was so engaged.

[fol. 3] 9. That the said Earle A. Brady, at the time of his death, was serving as a brakeman and had been receiving as compensation for his services approximately \$194.00 per month.

10. That the said Earle A. Brady died, leaving him surviving his widow, Irene Brady, and the following children by her, i. e., Adrian Brady, a child about 8 years of age, Ivanelle Brady, a child about 6 years of age, and the following children by a former marriage, to-wit: Hilda Brady Allen, Katherine Allen, Jessie Brady (all of age), and Gordon Brady, a boy 18 years of age; that the said widow, Irene Brady, and her two children, Adrian and Ivanelle, were solely dependent upon the said Earle A. Brady for their support and maintenance and the said Gordon Brady was partially dependent upon his father for support and maintenance.

11. That on the said 25th day of December 1938, at about 6:30 a. m., the plaintiff was engaged, together with other members of the defendant's crew, in a shifting operation at Hurt, Virginia; that the defendant's engine was backing a cut of four cars, to-wit: C & O Coal Cars Nos. 131834, 120785, 121158 and C & O Box car No. 7416, into the above

mentioned pass track, and the plaintiff's intestate was riding on said car No. 131834 when said car, with others, left the track and plaintiff's intestate was killed.

12. That on said occasion plaintiff's intestate was in interstate commerce for that there were cars in the cut of cars referred to and in the train being made up that were moving in interstate commerce, and the defendant at said time was engaged in, and the plaintiff's intestate was employed and engaged in, interstate commerce within the meaning of Title 45 U. S. C. A., Chapter 1, Section 51.

13. That the plaintiff is informed, believes and alleges that the death of her intestate Earle A. Brady, was proximately caused by the negligence of the defendant in the [fol. 4] following particulars:

(a) In that the defendant failed to exercise ordinary care to provide for the plaintiff's intestate a reasonably safe place to work, but required him to engage in a shifting operation which made it necessary for him to ride upon a freight car being backed by the defendant into the pass track at Hurt, Virginia, when the defendant knew, or by the exercise of ordinary care should have known, that said track and the instrumentalities in connection therewith were old, worn, defective, dangerous and out of repair; that the tee irons were of an ancient date, were worn and cracked, and that the cross-ties were old and rotten and the track insufficiently supported by proper ballast; that the derail at the north end of said pass track was old, defective and improperly installed, and the defendant knew, or by the exercise of ordinary care should have known, that to back a cut of cars into said pass track was likely to cause a derailment; that said cars were derailed on account of the aforesaid conditions.

(b) In that the defendant failed to properly inspect said track and see that it was in a reasonably safe condition for the shifting operation in which the plaintiff's intestate was employed at the time of his death.

(c) In that the defendant failed to provide at the aforesaid derail a light or any other warning that would enable plaintiff's intestate to observe whether the derail was open or shut.

(d) In that the defendant negligently and carelessly installed and maintained a dangerous and defective derail at the north end of the pass track above referred to.

All of which acts of negligence on the part of the defendant and without fault on the part of the plaintiff's intestate were the direct and proximate cause of the injury [fol. 5] and death of plaintiff's intestate.

14. That the plaintiff's intestate was at the time of his death a young man of 45 years of age, well and strong, with a life expectancy according to the mortuary tables of the State of North Carolina, of 24.5 years; that as a result of the negligent killing of the plaintiff's intestate the said plaintiff, as administratrix of said intestate, has been damaged and injured by reason of the wrongful death of her intestate in the sum of \$50,000.00, and this action is instituted by her as such personal representative of the late Earle A. Brady, for the benefit of his surviving widow and his children dependent upon him.

15. That plaintiff's cause of action for the wrongful death of the late Earle A. Brady arises under the laws of the United States Title 54, Chapter 1, Sections 51 to 59, plaintiff has caused this action to be instituted within the two-year limit set out in Section 56 of said act. In truth and in fact this suit has been brought in less than 12 months after the action accrued, for that the plaintiff's intestate, Earle A. Brady, met his death on the 25th day of December 1938.

Wherefore, plaintiff prays that she have and recover of the defendant the full sum of \$50,000 and the cost of this action to be taxed by the Clerk, and for such other and further relief as to the Court may seem just and proper.

Frazier & Frazier, Attys. for Plaintiff.

-(Verified).

IN SUPERIOR COURT OF GUILFORD COUNTY

ANSWER

The defendant, answering the complaint of the plaintiff, says:

1. That the allegations of article 1 of the complaint are admitted.

2. That the allegations of article 2 of the complaint are [fol. 6] denied as hereinafter admitted.

3. That the defendant denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of article 3 of the complaint and, therefore, denies the same.

4. That the allegations of article 4 of the complaint are admitted.

5. That the allegations of article 5 of the complaint are admitted.

6. That the allegations of article 6 of the complaint are admitted.

7. That the allegations of article 7 of the complaint are denied, except as hereinafter admitted.

8. That the allegations of article 8 of the complaint are admitted.

9. It is admitted that plaintiff's intestate was serving as a brakeman, at the time of his death, and that he was paid certain compensation, on a mileage basis, for the days during which he was employed but that he was an extra man and not employed regularly each day. Except as herein admitted, the allegations of article 9 of the complaint are denied, and it is expressly denied that as compensation for his services he had been receiving approximately \$194.00 per month.

10. That the defendant denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of article 10 of the complaint and, therefore, denies the same.

11. Answering the allegations of article 11 of the complaint, the defendant says that after the freight train on which plaintiff's intestate was employed as brakeman, arrived at Hurt, Virginia, on December 25, 1938, at about 5:50 A. M., he opened the switch and set the derailer for said train to back into said pass track, and said train did back into said pass track, to clear the north main line track for a passenger train to pass. That there- [fol. 7] after the freight train pulled out of the pass track and backed up on the north main line track, after which

plaintiff's intestate cut off all but the four cars alleged in the complaint, again opened the switch to the pass track, and upon signal from him the engine backed said cars into said pass track, whereupon they struck the derailer, which plaintiff's intestate had negligently and carelessly set back in derailing position and after the said freight train had pulled back on the north main line track as aforesaid, causing the derailment of said cut of four cars and resulting in the death of plaintiff's intestate, solely, directly and proximately by reason of his aforesaid negligence and carelessness in setting said derailer in a derailing position. That, except as hereinabove admitted, the allegations of article 11 of the complaint are denied.

12. That the allegations of article 12 of the complaint are admitted.

13. That the allegations of article 13 of the complaint are denied.

14. That the allegations of article 14 of the complaint are denied.

15. That the allegations of article 15 of the complaint are denied.

And For A Further Answer And Defense the defendant says:

1. That on the date alleged in the complaint, plaintiff's intestate had had about 15 years experience and was thoroughly familiar with his duties as brakeman; that as a term of his employment by the defendant he assumed all of the usual and ordinary risks and dangers incident to his employment, including the risk and danger of being injured or killed by cars in switching operations such as that involved herein; that he was thoroughly familiar with the tracks of the defendant at Hurt, Virginia, and the location, condition, position and operation of the derailer on said pass track, and with all movements of the engine and cars involved in the switching operations at said place at the time alleged in the complaint and he was giving the signals for such movements; that the risk and danger of derailment of cars by reason of said derailer being set in derailing position was well known to plaintiff's intestate, and was open, obvious and apparent to him; that although plaintiff's intestate knew that said derailer on said pass track was set in

a derailing position, nevertheless, he signalled for said engine and cars to back into said pass track and against said derailer, and defendant alleges that the risk and danger of derailment of said cars, under said facts and circumstances, was open, obvious and apparent to plaintiff's intestate and fully understood, realized, and appreciated by him, and that such risk and danger was ordinary, usual, and incident to the work being done by plaintiff's intestate, and not due to any negligence or want of due care on the part of this defendant, and that it was an ordinary risk of his employment, incident thereto, which plaintiff's intestate voluntarily assumed; and the defendant hereby expressly sets up and pleads such assumption of risk on the part of plaintiff's intestate in bar of recovery in this action.

2. That the death of plaintiff's intestate was directly, solely and proximately caused by his own negligence in failing to exercise reasonable and ordinary care for his own safety in that he negligently and carelessly caused said engine and four cars to back into said pass track after he had negligently and carelessly set the derailer on said pass track in a derailing position; and this defendant further avers that even if it was negligent, as alleged in the complaint, all of which it here and now again denies, then, and in that event, the aforesaid carelessness and negligence of the plaintiff's intestate concurred with that of the defendant and contributed to, and was a proximate cause of, the death of plaintiff's intestate; and the defendant hereby expressly sets up and pleads such contributory negligence on the part of plaintiff's intestate.

[fol. 9] Wherefore, the defendant having fully answered the complaint of the plaintiff, prays that the plaintiff take nothing by her action, and that the defendant go hence without day and recover its costs in this behalf expended.

R. M. Robinson, W. T. Joyner, Attorneys for Defendant.

(Verified).

IN SUPERIOR COURT OF GUILFORD COUNTY

JUDGMENT

This cause coming on to be heard at the March 30, 1942, Civil Term of the Guilford County Superior Court, and be-

ing heard before His Honor, Wilson Warlick, Judge presiding, and before a jury duly sworn and empaneled, and issues having been submitted to and answered by the jury as follows, to-wit:

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint?

Answer: Yes.

2. Did the plaintiff's intestate assume the risk of being killed, as alleged in the answer?

Answer: No.

3. Did the plaintiff's intestate, by his own negligence, contribute to his own death, as alleged in the answer?

Answer: No.

4. What amount of damages, if any, is the plaintiff entitled to recover from the defendant for the benefit of Irene Brady, widow of plaintiff's intestate?

Answer: \$10,000.00.

5. What amount of damages, if any, is the plaintiff entitled to recover from the defendant for the benefit of Ivanelle Brady, minor daughter of plaintiff's intestate?

Answer: \$5,000.00.

[fol. 10] 6. What amount of damages, if any, is the plaintiff entitled to recover from the defendant for the benefit of Adrian Brady, minor son of plaintiff's intestate?

Answer: \$5,000.00

Now, Therefore, It Is Ordered, Adjudged and Decreed that the plaintiff have and recover judgment against the defendant: (a) For the sum of \$10,000 for the benefit of Irene Brady, widow of plaintiff's intestate; (b) for the sum of \$5,000 for the benefit of Ivanelle Brady, minor daughter of plaintiff's intestate; and (c) for the sum of \$5,000 for the benefit of Adrian Brady, minor son of plaintiff's intestate.

It Is Further Ordered and Decreed that the costs of this action be taxed against the defendant.

Wilson Warlick, Judge Presiding.

IN SUPERIOR COURT OF GUILFORD COUNTY

APPEAL ENTRIES

Upon the coming in of the verdict the defendant moves to set same aside, as being against the greater weight of the evidence and for a new trial. Motion overruled and the defendant excepts. The defendant then moved for a new trial as a matter of law for errors assigned and to be assigned. Motion overruled and defendant excepts. Judgment signed, as appears of record, and the defendant again excepts and in open Court gives notice of appeal to the Supreme Court, further notice waived. By consent and in the discretion of the Court, defendant is allowed 60 days from April 14, 1942, within which to make up and serve case on appeal, and the plaintiff is allowed 45 days thereafter within which to serve counter-case or file exceptions. Appeal bond in the sum of \$100.00 adjudged sufficient.

This 14th day of April 1942.

Wilson Warlick, Judge Presiding.

[fol. 11] IN SUPERIOR COURT OF GUILFORD COUNTY

AGREEMENT OF COUNSEL AS TO APPEAL—May 21, 1942

It is hereby stipulated and agreed by and between attorneys for the plaintiff, appellee, and attorneys for the defendant, appellant, that the defendant, appellant, shall have an extension of time until and including the first day of August 1942, within which to make up and serve case on appeal to the Supreme Court of North Carolina, in this cause, and that the plaintiff, appellee, shall have an extension of time thereafter until and including the first day of October 1942, within which to serve counter-case or file exceptions.

This 21st day of May 1942.

C. C. Frazier, by D. E. H., D. E. Hudgins, Attorneys
for Plaintiff, Appellee. W. T. Joyner, by R. M. R.,
R. M. Robinson, Attorneys for Defendant, Appel-
lant.

IN SUPERIOR COURT OF GUILFORD COUNTY

Statement of Case on Appeal

This is a civil action by plaintiff under the Federal Employers' Liability Act to recover damages from the defendant for the death of her intestate, which she alleges was caused by its negligence.

The trial of this action was begun on Wednesday, April 8, 1942, during a regular, statutory two weeks Civil Term of the Superior Court of Guilford County, North Carolina, which Term commenced on March 30, 1942, and the Court, by consent, and as authorized by C. S. 4637, duly and regularly continued said Term to conclude said trial (as will appear from Minute Docket entries which need not be set out in the record) until and including Tuesday, April 14, 1942; the trial resulting in a verdict and judgment in favor of the plaintiff, for the benefit of herself and others, and against the defendant, in the sum of \$20,000 and costs, as set out in the record, from which judgment the defendant prosecutes this appeal.

[fol. 12] The Court was duly and properly organized, the jury was duly constituted, and it shall not be necessary to set out in the record the organization of the Court, the constitution of the jury, or other formal matters. The jury was duly selected, sworn and impaneled, the pleadings read and the following evidence offered:

PLAINTIFF'S EVIDENCE

The defendant admits that the plaintiff is the duly qualified and acting administratrix of the estate of her deceased husband, as alleged in the third paragraph of plaintiff's complaint.

The defendant admits that it is a common carrier by railroad engaged in interstate commerce, and that the plaintiff's intestate was employed by the defendant in such commerce at the time of his death; that this case, therefore, is one arising under the Federal Employers' Liability Act.

Plaintiff Offered In Evidence the summons in this case, dated July 26, 1939, served July 27, 1939, and marked Exhibit P-1. This summons is copied in transcript of the record proper and is not here repeated.

The defendant admits that the intestate of the plaintiff, Earle A. Brady, came to his death on December 25, 1938, at Hurt, in the State of Virginia.

Plaintiff Offered In Evidence Paragraph 1 of the Complaint as follows:

"That the defendant, Southern Railway Company, is and was at the times herein complained of a corporation duly chartered under the laws of the State of Virginia, engaged in the business of a common carrier of freight and passengers for hire."

Paragraph 1 of the Answer of defendant, as follows:

[fol. 13] "That the allegations of article 1 of the complaint are admitted."

Paragraph 4 of the Complaint as follows:

"That on the 25th day of December 1938, and for some years prior thereto, the defendant owned a right-of-way, together with a railway line leading from Altavista, Virginia, through Hurt, Virginia, and on to Greensboro, North Carolina, and points South; that the tracks and right-of-way at Hurt, Virginia, are in what is known as the Danville Division of the Southern Railway System."

Paragraph 4 of the Answer of defendant, as follows:

"That the allegations of article 4 of the complaint are admitted."

Paragraph 5 of the Complaint as follows:

"That on said 25th day of December 1938, the defendant owned and maintained on its right-of-way at Hurt, Virginia, its northbound and southbound railway main lines, together with a certain pass track or storage track; that said pass track was and is just east of the defendant's northbound main line and was and is connected therewith by switches at each end of said pass track; that at a few feet south of the switch at the north end of said pass track there was and still is located and maintained by the defendant a certain device known as a derail."

Paragraph 5 of the Answer of defendant as follows:

"That the allegations of article 5 of the complaint are admitted."

Paragraph 6 of the Complaint as follows:

"That on the 25th day of December 1938, at the time and place of the death of the plaintiff's intestate, the defendant was engaged in interstate commerce."

Paragraph 6 of the Answer of defendant, as follows:

[fol. 14] "That the allegations of article six of the complaint are admitted."

Counsel for plaintiff Offers In Evidence the Mortuary Table, Consolidated Statutes 1790, to show that life expectancy of a person of age of 45 years is 24.5 years.

MRS. IRENE BRADY testified: I am the wife of the late Earle A. Brady. I was married to him about 13 years ago; have two children by him, Adrian, who is 11 years old at this time; and Iva Nell, who is nine at this time. Mr. Brady had been previously married, having four children by his first wife. Their names were Gordon, Jesse, Hilda Allen and Katherine Allen, all of whom are of age except Gordon, who was 18 years old at the time of his father's death.

Mr. Brady was in the service of the railroad at the time of his death on December 25, 1938. At that time he and I were living in Greensboro at 1211 Pearson Street. In addition to his work with the railroad he painted; I would say his earnings on December 25th, 1938, and prior thereto were approximately \$194.00 a month. His health was very good. He was 45 years old the day he was killed. It was his birthday. His habits of life were very good; and he provided well for his family. He was a very good father to the children and a very good husband to me.

I did not keep any record of the exact time that he worked but he worked whenever they had work for him and when they did not have work for him he usually painted. Whether he was working for the railroad or painting, he was working continuously. The children and I had no other support than that earned by him. He contributed regularly to our support.

After my husband's death I had occasion to go over to Hurt, Virginia, and see the place where he was killed. I saw [fol. 15] this derail that has been referred to there on the pass track or storage track at Hurt, Virginia. I saw the

T-iron rail. With respect to the condition of the iron rails along about the point of the derail, especially the rail just opposite the derail, they were in very bad condition. They were all scaled all along the sides; and by scales I mean I saw pieces like that (indicating pieces of iron shown to the witness) that were loose on the side of the rail. Those pieces that I described were on the side of the ball of the rail. There were pieces on both sides, both on the outside of the ball and the inside of the ball. I am referring to the rail, on the west rail of the track.

I had occasion to notice how the derail fit on the east rail and you could move it back and forth that way with your hand (illustrating). I observed grooves on the north end of the derail. I imagine it is used to throw the wheel off when the train backs, that is, south. There was a groove on the derail on the north side of the groove that threw the trucks off which was to one side. It was not directly in line, that is, if the train were moving south, the little groove on the north end of the derail was not in line with the track as it entered the derail from the south. I noticed this derail switch, as they call it, and there were prongs on the target for the placing of a lamp but there was no lamp there.

Cross-examination.

I did not operate the derail switch when I got there. I just merely touched it and I noticed it would shake that way. I did not touch it with my finger just took my hand it was very easy to shake. It was on the rail. I did not measure the distance I could shake it and therefore, I could not be exact about the number of inches it would move. I don't know whether it was as much as an inch from side to side or not. I did not say that I concluded that it ~~was~~ not locked from the fact that it was shaky. It has been a year or more since [fol. 16] I was there, which was before the last trial. I was not asked about that on the last trial. I have been up there since the trial but I saw the things that I spoke of before the last trial. I don't have the least idea how much the derail weights but it is a heavy piece of metal. I testified on the last trial, as I recall, that my husband was earning approximately \$195.00 from the Southern Railway when he had regular work. I would not say whether during any month in 1938 he made that much but he did in 1937, I know — earned as much as \$194.00 as brakeman from the South-

ern Railway Company. He kept a record of some of his time but he did not keep a record of it all.

I said that when I was up there I saw slivers of the rails such as Mr. Frazier showed me hanging off of the side of the ball, both on the outside and inside of the rail, opposite the derailer. I saw that both times I was there. I looked at the track, the derailer and the rail on which the derailer rested and the track opposite the derailer very carefully and that is one of the reasons I went there. I am familiar with its appearance pretty well. (Examining picture marked "D-1"). That is a fair picture of the track and derailer but it looks to me like it is taken more from the south direction than from the west direction (indicating); this would be south direction instead of north—if it is taken from the west, it looks to me like it would get the side of the tracks. It shows the rail opposite the derailer but I would say that the picture was taken from the south looking west, it looks to me like—no, this is north, looking south—that is right.

(Examining picture marked "D-2"). That is a very good picture of the derailer, yes, sir. I would not say it is a fair picture of the ties at the time I was there because I don't know. It is a very fair picture of the derailer on the rail.

[fol. 17] (Examining "D-3"). That is a fair picture of the derailer. Naturally this picture does not show the exact condition of the rail but it is a very clear picture of inside of the rails but it does not show the defects. I mean it does not show them on the inside. I mean there are some defects on both sides of the rail. I mean there are some defects on the inside of this rail that don't show on the picture. They may be there but they don't show in the picture. I don't know whether the defects I saw on the inside of the rail were on this exact rail but they were in the ones that I saw there, and that one is the one that I told Mr. Frazier was opposite the derailer. Yes, this picture shows that this rail is opposite the derailer.

(Examining picture marked "D-4"). This picture looks more like the representation of the derail switch, the derailer and the track if the picture was taken some few feet north of the derailer looking straight down the track to the south than the others that I have seen. This appears

to be a fair representation of the derail and cross-ties and rail taken just north of the derailer and looking south.

(Examining "D-5"). This appears to be a fair picture of the track and derailer and so forth taken more or less between the northbound track and the pass track looking a little from the east or southeast and that shows somewhat the other side or outside of the rail opposite the derailer. That appears to me to be a fair picture of the outside of the rail on the pass track just opposite the derail.

(Examining "D-6"). I don't know what a track gauge is. I have heard of it but would not know one if I saw it. This picture appears to be a fair picture of the representation of the scene including the siding or pass track with the derailer and target all looking north towards the Hurt station and shows the Hurt station but I never noticed the bar which appears to be running across the tracks.

[fol. 18] Outside of the fact that there is a bar in between the rails at the derailer I would say that is a fair picture. I don't know what that bar represents or is. This last picture that you show me, I have no opinion about that because it shows a car that was not there when I was there. I don't know what that picture is because there was no such car there at the time I was there.

I said that Mr. Brady was employed by the railroad as a brakeman. At the time of his death I suppose he was making a run or started to make a run to go up as far as Monroe, Virginia, as brakeman on this run. He left home about 12 o'clock on Saturday and when I saw him again he was in the undertaker's establishment. He was supposed to be going to Monroe, Virginia. He had been a brakeman on the railroad since 1922. I know that during those years he had made runs as brakeman on trains over various tracks of the Southern Railway. In making those runs he had frequently made previous runs as brakeman to Monroe, Virginia, on both freight and passenger trains. In other words, he had run up from the south and made a run back from Monroe back to Spencer both on passenger and freight trains as brakeman.

• Redirect examination.

None of the questions about the derailer or tracks were asked me at the former trial. The defendant did not have any of those pictures at the former trial to present to me.

Recross examination.

Mr. Frazier and Mr. Hudgins were at the former trial and put me on the stand and questioned me. They did not ask me any questions about my trip to Hurt to look at the rail.

Redirect examination.

Mr. Robinson was there too, and did not ask me anything about it.

Recross examination.

My nephew, Richard Smith, and his wife, Nellie, went [fol. 19] with me to Hurt the first time. They are from Liberty, North Carolina, and at the present time he is working in Wilmington in the shipyards. If I remember correctly we went up there a year ago last November 1940. On the second trip that I took up there my brother, Mr. C. A. Smith, and Mr. Frazier went with me. Richard Smith is my nephew. We took the last trip on Friday after this past Christmas 1941. No one else went with me except Mr. Smith and Mr. Frazier.

Redirect examination.

At the time Mr. Frazier went with me I did not go up to see the tracks at all.

MRS. IRENE BRADY (recalled) testified for the plaintiff: At the time of Mr. Brady's death his youngest child by his first wife was 18 years old. At that time he was not living with us but was living with his mother. To my knowledge my husband was not contributing anything to his support at that time after he was 18.

Examination by the Court.

My husband was divorced from his first wife and subsequently was married to me. I have two children by my husband. At the time of my husband's death his youngest by his first wife, Gordon, was 18 years old and was living with his mother. At that time he was supporting himself and was not dependent upon my husband for a living. My husband was looking after the two children and myself.

Just the four of us including my husband constituted the family circle at the time of his death.

Redirect examination.

My two children and I were absolutely dependent upon my husband at the time of his death. My brother helped me some until I got a place to work at the Burlington Mills, Hosiery Division. At the present time my brother is not giving me anything but he did before I went to work.

[fol. 20] On January 3, 1941, after due notice and upon commission duly issued, plaintiff examined L. O. Woodson and George W. Brandt, employees of defendant, before a Commissioner, as provided by C. S. 899-902, and upon the trial plaintiff offered in evidence the said examination of L. O. Woodson as follows:

L. O. Woodson testified: My name is L. O. Woodson, and I live on Fourth Street at Spencer. I am connected with the Southern Railway Company, and have been employed by it as engineer for 29 years on the extra list. I was on the crew operating train 58 at Hurt, Virginia, on December 25, 1938.

The other members of the crew were Mr. Brandt, Conductor; Mr. Scruggs, Flagman; Mr. A. L. Dorsett, Fireman; Mr. Brady, on the head-end braking. There was nobody else in the crew. The train was going from Spencer to Monroe. It was a freight train. It got to Hurt, Virginia, about 5:50 on the morning of December 25th, 1938. Mr. Earle A. Brady got killed there about 6:30. It was still dark at that time of the morning.

We had to engage in a shifting operation at Hurt. We went there and backed in the pass track and let No. 30 go by. After No. 30 went by, we pulled out and backed up the main line and cut off four cars off the head end of our train, going in the pass track and picked up twelve cars—I believe it was twelve—it has been right smart while since then. No. 30 was going north. These twelve cars were on the pass track when we came to Hurt. We backed into the pass track which was sufficient to take care of the entire length of our train in addition to the twelve cars that were already in the pass track and enable the engine to clear the switch. The cars attached to the engine did not couple up with the twelve cars in the pass track. After we went

into the pass track to let No. 30 by on the northbound track [fol. 21] we pulled out of the pass track and backed up the main line. We pulled out of the pass track going north and backed back south on the northbound track bringing out all of the cars that were coupled to the engine and leaving the twelve cars on the pass track that had been there to start with.

After we got out on the northbound track we cut off four empties with the engine. Before that there were about 36 or 37 cars attached to the engine. The brakeman cut off the four empties; I was handling the engine. They were Lynchburg cars we were holding to go in there and pick up, so we had them next to the engine so we would have them there at Lynchburg and have them in the yard.

The four cars were on the head end of the train or just behind the engine. After these four cars were cut out we went back into the pass track to pick up the twelve cars. We had these four cars and the engine and went back northward and backed into the pass track so as to pick up those twelve cars in the pass track. I saw Mr. Brady on that movement. As we backed into the pass track Mr. Brady was on the end of the lead car, giving signals. He was on the end of the front car as the train was moving back. He was in front of the train as it moved southward, judging the front as the way it was going. He was on the side on the step with his lantern giving signals. He was there on the step signaling me back. The engine was facing north. I sat on the east or right-hand side of the engine. Mr. Brady was on the southeast corner of the car. It was a gondola car the best I can remember—one of those coal-hopper-type cars, open at the top. I did not see anything happen to him as he was on the step there. I was looking the way I was backing the train.

There was no light on that switch. None on any switch in the shifting yard. Mr. Brady was on the car and it had passed over the switch about two carlengths, I guess, the [fol. 22] last time I saw him.

There is a derailer on the pass track at that end about three or four carlengths south of the switch. I don't know how many feet it is. When the train was moving backward to go into the pass track to get these twelve cars I did not observe anything happen—only the fireman hollered that the cars were jumping back there. There was nothing from

the engine that gave me any notice that there was any derailment. The fireman, A. L. Dorsett, told me about it. He said stop. I got down and went back there. Mr. Brady had got run over and killed. His body was not quite a carlength south of the derailer. I observed the cross-ties. When the cars left the T-irons the first car jumped to the west and the second car to the east. There were two cars beyond the point where Mr. Brady's body was found.

In the movement of this shifting operation Mr. Brandt was checking up the twelve cars on the pass track that we were going to pick up. (Mr. Frazier exhibits to the witness a little rough diagram or sketch, marked for purposes of identification "a").

That is substantially the way the tracks are located at Hurt, Virginia. The first track on the west is a little short spur track going to the house track. The next track going eastwardly is the southbound main line. The next track as you still go eastwardly is the northbound main line and the next one is the pass track that I have been speaking about. There is a road crossing some little distance south of the house track. The twelve cars on the pass track were south of the road. They were at the south end of the pass track. When we left the rest of the train on the northbound track, except the cut of four cars, the caboose was left with the rest of the train. He (the flagman) and the conductor were over there with reference to those cars. The fireman and I were on the engine. That left no one else of the crew except Mr. Brady who was on the lead car as we moved into [fol. 23] the track. There was no derailer in the south end of the pass track.

The switch which connects the pass track with the northbound track was one of those regular hand-turned switches which goes over with a bar. I don't know whether there was fixed on that switch the prongs or holders for a switch light. I didn't look there at the derailer. I seen it was on the derailer and did not go over there. I left. I seen it was on the derail from the side, here. I saw that the cars were off and saw the cars on the derailer. The derailer was on top of the rail, so as to—that is the purpose of the derail—so as to throw the car off. That is what it is for. I saw that, instead of being fixed for cars to move into the pass track, it was closed. I never noticed whether or not the derailer had any device for a light. I never noticed that. You

see, I don't come in contact with them. I don't handle them. We don't have any derails in any of the yards. They are used at storage tracks. We do not use lights on them when they are outside the yard. I have not seen lights on a derail.

The train was moving about three or four miles an hour as I backed into the pass track. At that speed I could stop in less than a car length. There was nothing to obstruct my view or keep me from seeing Mr. Brady on the gondola car as I moved along. When the cars jumped the derail on the pass track I did not see any T-irons broken or track torn up. I saw flange marks on the crossties but none of the T-irons were hurt so far as I seen.

After I went back and found Mr. Brady I told the fireman to blow the alarm for the conductor and I went back for the conductor. I left the four cars. I left everything there. I went on foot to get the conductor and I found him coming down the track to meet me. When I met him he was about thirty or forty cars from the place where I found Mr. Brady. [fol. 24] Mr. Scruggs was back at the cars we were going to pick up. I don't remember whether he came on down to where Mr. Brady was, but I believe he went back to flag, after this happened. Went back south to protect and flag the rear.

In this second movement into the pass track I did not send anybody down to watch the crossing. Mr. Scruggs was flagman. At the time the cars were being backed into the pass track he was on top of the twelve cars where they were taking the brakes off, I don't know which end. All I could go by was his light. I saw his light. I guess he was 75 cars south of the derailer. I could see his lantern. After I got Mr. Brandt there I turned over to him and had nothing more to do with it and went back to my engine. We went up and got the engine and went up southbound and took our train and left there. Came in behind and pulled the 12 cars out of the pass track. Came up south on the southbound track, crossed out here and shoved them on the southbound track and came to the northbound and backed up on the southbound so that we didn't have to cross over the derail any more. We left the four derailed cars and I don't know what became of them after that.

The use of derailleurs and mechanism of that kind does not fall in my branch of the service. My duties are operation of the engine and I work by signals altogether.

Cross-examination:

When we reached Hurt, Virginia, the train was about thirty-six or -seven cars and went on north of this storage or pass track. I then backed that whole train south into the pass track and had no trouble getting in there. After No. 30 passed I came north out of the pass or storage track then backed south some distance on the northbound track, passed the switch at the north end and up above the crossing. Mr. Brady cut off the four ears. I saw him. I was looking right at him. When we backed into the pass or storage track the [fol. 25] first time and got in there to wait for No. 30 to go by, I saw Mr. Brady close the switch and the derailer. Mr. Brady gave me the signal to come back out. He set the derailer not to derail and opened the switch for me to come out and I came on out. Then I pulled out and back down south on the northbound track beyond the crossing. Mr. Brady was on the four cars and I saw him get off these four cars. He rode back north on these four cars 'til he got north of the switch. He got off the car and threwed the switch and got back and signaled me back. From the time I came out of the switch until I came back in there I never seen anybody else in there, other than Mr. Brady.

Redirect examination:

In backing into the pass track when I had the cut of four cars connected to the engine, I did not make any stop until the fireman notified me.

PAUL SHIELDS testified: My name is Paul Shields. I live at Hurt, Virginia, and was living there on December 25, 1938, when a train ran over Mr. Brady. I did not know who it was until I heard his name mentioned afterwards, and I never knew him before.

I saw bits of clothing and blood along the tracks right close to where the derail was where he got killed. I am familiar with the tracks at the station at Hurt. I had seen this derail up there before. It had a little thing up on the top of it for a light to be set in but there was no light there. It has one on it now but I did not see any light on there back before Mr. Brady was killed.

The diagram on the floor accurately shows the main lines of the railroad company, the pass track, and the crossing.

The general direction of the tracks as you go through Hurt is north. The station is north of the road crossing at Hurt. It is beyond the switch where the pass track joins the northbound track. I think the road crossing is about one eighth [fol. 26] of a mile south of the derailer that we have been talking about. There is another sidetrack on the west side of the southbound track that is not shown on this map and another derail over there.

I recall an occasion when Mr. Busick, who is in the courtroom here, and Mr. Frazier came over to Hurt, Virginia, and saw me up at the station and I and another little boy went with them down to where this derail was. The T-iron was there after this derailment as it was before. When Mr. Busick and Mr. Frazier were there I saw them pick up some little pieces of metal off the top of the west rail or the rail just opposite the derail on the pass track. You are the Mr. Frazier referred to. I recognize those two pieces of metal (indicating). They came off of the west rail just opposite the derailer. You got one, I think one off of each side, but I am not sure which came off of which side, but I know one came off of one side of the rail and one off of the other. That was the rail just opposite the derailer, the west rail of the pass track. I also saw some other little pieces picked up there, a little different shaped pieces from those I looked at a while ago (indicating). I recognize these two. They came off this same rail that I have been referring to.

Plaintiff offers in evidence the four pieces of iron referred to, and the same are marked Exhibit P-2. These exhibits not being susceptible of reproduction or copying in the printed record, it is agreed that counsel may present them to the Court at such time and in such manner as to the Court may seem proper.

On the crossties just south of the long crossties on which the derailer switch is located, I noticed where the wheel had cut off when it jumped the track. (Indicating) As near as I can tell, when the wheels jumped the derailer, one wheel was in between the tracks and one on the outside of the [fol. 27] derailer. The car jumped to the west. I don't know how far it was up this side of the derailer where I saw blood along the tracks, but it was between the tracks.

The first track just west of the pass track is the northbound track and the next track is the southbound track.

Cross examination.

I was standing up at the station one day at Hurt, Virginia, when two men came along. I do not remember if I had ever seen Mr. Busick and Mr. Frazier before. They asked me to come on down the track with them and I went down with another boy. Mr. Frazier and Mr. Busick picked these pieces off the rail and I was watching them pick them off. I don't remember how long ago it was, I think it was in the summer of 1940. I paid particular attention that they picked some off of the inside as well as off of the outside. It is natural if you see anyone you always watch what they do, at least I do. I not only watched and saw what they were doing, but I saw they were picking some off of the inside and some off of the outside. There were a lot more slivers on the inside of the rail then. The rails have not been changed, they are the same rails. I go up there right often. I live about a quarter of a mile from that place. I do not work for the railroad. The station is on the opposite side of the tracks from the derailer going north. It is nearer from the derailer to the station than it is from the derailer to the road; I would say just about two-thirds as far—two or three city blocks, I think.

I live about one-eighth of a mile from the station. I don't know how many times I have been back down there to this derailer since I went there with Mr. Busick and Mr. Frazier. I have passed there other times after that but I didn't pay any attention to it, not strict attention. I did not pay any strict attention to the derailer when I went [fol. 28] down there with them, and I haven't paid any strict attention to the derailer at any time since then. I told Mr. Frazier that the target for the derailer did not have a light then but has got a light now. I was speaking about the derailing part where it sits on the rail. I did not pay any attention to that but I have been watching the target. I am not employed by the railroad, it is not any of my business and it does not concern me in any way. I just thought there was supposed to be a light there. I paid no particular attention to the derailer, the part that sits on the rail. I would just pass by there, I would just be walking up the rails and when I did I looked over to see if they had yet put a light on it. I did not pay any attention to anything else. I am talking about the light at the derailer. It is there now, I think, but not then. There is a

switch near the derailer. I did not notice the switch. I know it was there, but I did not notice how it worked. I did not notice whether it had a light on the switch. The switch is right near the derailer, just a little north of the derailer where the pass track comes out of the northbound track, and I never noticed anything about that at all.

I think there is a light on there now, but I don't know. It is just like it was. I saw it one time and it did not have no light and one time it did. I know it had it at one time after the accident—I am not thinking about that—I know it. It was a pretty good while ago that I saw one on the derail target. I could not tell you exactly. About three years, I guess. That was after I went up there with Mr. Frazier and Mr. Busick and I went up there with them in the summer of 1941. I think it was in the Fall of 1941 that I noticed that they had put a light on the derailer. I am talking about the light on the derailer—I am not confusing it with the switch or automatic block system light. There is no mistake about my swearing that I saw and know that there was a light on the derailer sometime after I went down there with Mr. Busick and Mr. Frazier. I know I saw it on [fol. 29] there. It was in the daytime. It worked on the order of a lantern and had red and green lights in it. It was sticking up on the derail target just opposite the derailer. I had never seen it before and I don't know whether I have ever seen it since then. I have been back up there since then. I did not look to see whether it was there since then.

H. L. KOONTZ testified: My name is H. L. Koontz. At the present time I am solicitor of the Twelfth Judicial District, which includes Greensboro and Guilford County.

I knew the deceased, Earle Brady; he painted my house, the house I now live in, under the general contractor, when it was built. I think most of the painting was done in the late winter and early spring of 1936. I suspect that it was the last two months that I had occasion to observe him while he worked on my house and the painting was done along as the work progressed. I had occasion to observe his work during that period and talked with him from time to time. Apparently he was in robust health. Before he was engaged to work on my house I discussed him and his reputation and his ability, with the general contractor.

I, of course, saw Mr. Brady practically every day during the progress of the building of my home and was very much interested in what kind of painting he was doing and discussed the colors and how much paint and all that sort of thing with him. He was very diligent in carrying out his work under the general contractor and did it, we thought, very well. He was very punctual and apparently very diligent in carrying out the work he had to do on my job and he was a capable worker.

I have no interest whatever in this case; not the slightest connection whatever. I did not know there was any case like this until sometime ago when the matter was up before. My knowledge that I might be called as a witness came incidentally from a conversation with you.

[fol. 30] J. H. Busick testified: I live at Battleground at the present. I had known Earle A. Brady for ten or twelve years and had occasion to observe his apparent condition of health. From my observation he was in perfect health.

I am in the painting business. Mr. Brady did painting for me and he was what we call a first-class mechanic in the handling of a brush. I had occasion to go to Hurt, Virginia, sometime to see this place where Mr. Brady was killed. I believe you and I went over there. It was a mighty warm day and I suppose it was in the summer. When we got there I saw a couple of little boys at the station at Hurt and this boy, Paul Shields, was one of them. As well as I remember, we asked them where that fellow got killed down there. Of course, they did not know us and we did not know them. We asked them where he got killed and this young man said, "I will take you down and show you." I looked at the derail and made observations with reference to the derail and with reference to the west rail of the pass track.

As we went on down from the station, as I recall we came to the switch first. We got in off of the main line on the pass track and then on beyond that, I don't know how many feet, there is the derailer on the track. It looked to me like the iron rail on the pass track just west of where the derailer is located was in poor condition. It was old, almost worn out, it looked to me like. I have seen rails on the

regular main line railroad, and have noticed how thick the ball of the rail is, that is, the top part that the wheels run on. I would say a rail in good condition is about two inches thick, the ball. I don't think we measured the ball of this west rail just opposite the derailer on the pass track, but it was very thin. I saw the top of it and how badly it had been worn. (Examining) I saw and picked up myself some of these little pieces that were hanging up on top of the rail and along on the ball of it. I recognize these two pieces [fol. 31] of metal that you hand me. They appear to be some of the ones that we collected there the day we were there. I would say this piece here is the side of the ball and is about one-quarter of an inch thick there. (Examining) I recognize these two pieces that you now show me as coming off of the same rail. As far as I recall, slivers of that kind were on both sides of the ball of the rail, both on the inside and on the outside. That was on the west rail. I picked up some pieces myself but don't have them with me. They are the same kind of metal as those there.

I observed the derail and say there is a little groove on the north end of the derail to catch the flange of a wheel moving south. The derail, as I observed it there, was slanting, going down north. I observed the crossties of the track and there were some marks on the crossties. The marks I saw on the crossties were similar to what has been marked here on the floor by Mr. Shields. At that time, so far as the ballast of the track was concerned, it looked like the ties were standing up on top pretty well. With respect to the elevation of the crossties upon which the derail was resting, it slanted to the west some. As I recall, some of those crossties were replacements and those that had not been replaced I would say were old, in poor condition and had been there some time.

This diagram on the floor representing the way the northbound and southbound and pass tracks are located at Hurt, Virginia, illustrates the way it looked.

Cross-examination:

This was June or July when I was there but don't remember the month. I said the rail opposite the derailer appeared to me in bad condition but I am not any rail expert. I say in my opinion it was in bad condition when Mr. Frazier and I first got there. I will not say that there was

not much rail left when we left. The reason we did not go up to the station somewhere and tell some of the railroad [fol. 32] people that we had been picking their rails and they had better not run another train over it was because we did not figure that was any of our business, but was their business. Someone had already got killed there and we were trying to find out how come and why. It was up to the Company if anybody else got killed.

I said, as I recall, the rail was in poor condition opposite the derailer. As I recall, I picked those things off of both sides of that rail. I know I picked them off. I would say I picked them off of both sides and I would not say so unless I knew it. I am saying to the jury that I know I picked them off of both sides. There is a rail there just opposite the derailer—I don't know how long the rails are, 15 or 20 feet—I would not say that it was just opposite the derailer that I picked them off. It could have been anywhere along the rail. But it was on the rail opposite the derailer. I did not go up there at any other time than this time. I looked at the track carefully.

(Examining "D-1") This is a representation of the derailer, but I don't know where this picture was taken. It could have been taken any number of places. I don't know whether that is at Hurt or some other place. I don't know whether that is a picture of the derailer and tracks at Hurt. I cannot identify that particular. I did not look at the derailer to see whether it had anything stamped on it as to its make. I am not sufficiently familiar with what is shown in there to tell you whether or not it shows the derailer at Hurt.

(Examining "D-2") I would say the same thing, that I am not sufficiently familiar with the background there to warrant me in saying that is the derailer at Hurt. I have an opinion satisfactory to myself and will say that the derailer shown in that picture is practically identical with the derailer I saw at Hurt that day.

[fol. 33] (Examining "D-3") I am not sufficiently familiar to say that I know whether or not this one was taken at Hurt.

(Examining "D-4") I say the same thing about the picture marked "D-4."

I am not familiar with the station at Hurt, except that I was just over there one time in my life.

(Examining "D-6") From this picture it looks something like the station up there, but I could not tell whether that is the particular one at Hurt unless I could read those signs. The view looks something like it. It looks like it might be but I cannot say whether that is the station or not. Yes, I would be familiar enough with it to say that is a fair outlay of it, but the ballast has been filled in and the rail looks like it has been polished up. They look a good deal better in the picture than they did at Hurt. In this picture they look like they are good rails. They may be the same rails that were there, but when you take a picture from a distance it does not look to be the same rail. This shows them to be polished up. They were pretty rough when I was there and a little rougher when I left.

(Examining "D-5") This picture resembles the rail a good deal, the jagged broken off places. That looks to be something like it. (Examining "D-5") This picture shows two or three different places there taken off from the outside of the rail. I don't know whether that is a picture of the rail at Hurt or not. I could not say that is a fair picture of the outside rail at Hurt opposite the derailer.

I don't know anything about the size and weight of the different rails; I have heard there is a 60-pound and a 65-pound rail, but I don't know it. I don't know that there is an 85-pound and a 100-pound rail, but some rails look heavier than others to me. I am not familiar with what an 85-pound rail is. I am not familiar with what a 100-pound [fol. 34] rail is. I don't know whether this was an 85-pound, 100-, 90- or 65-pound rail.

Redirect examination:

When I was up there I examined the inside of the rail that is just opposite from the derailer to see whether or not it had the year of its make stamped on it, and I believe it was 1912. We just pulled those little pieces of steel off with our fingers. We did not have to chisen them off. When I was there there was no such amount of ballast between the tracks and at the end of the crossties as in indicated in the picture Mr. Robinson showed me. It seemed to be a good deal of filling in of ballast on his picture.

Recross examination:

Mr. Brady did some work for me from time to time. I had known him for ten to twelve years before his death. He

lived at Ramseur when I first met him, then he moved over into South Greensboro. I live in Greensboro and when I took this trip to Virginia was in the painting business. Mr. Brady was in the painting business, too. I went to Hurt because Mrs. Brady asked me if I would go with Mr. Frazier to Hurt to look at the site where her husband got killed, and I said, "Yes." I don't know why she asked me other than that I was a friend of and knew Mr. Brady and he had worked for me and I had worked for him on some jobs. I don't know why other than that we were friends that she asked me to go. I went up there one time and have not been back since. I was a witness here before at the other trial and have not been back up there since then.

J. RUSSELL HOLDEN testified: I live at Greensboro at No. 2 Justall Court and I am with the North State Chevrolet Company. I worked in the railroad business from 1915 until 1928. I was in the office three years and then as brakeman on the road about ten years for the Southern Railroad Company. Most of my work was in the yard at Pomona and in connection with the performance of my duties as brakeman with the Southern Railway Company [fol. 35] I had occasion to become familiar with and did become familiar with the pass tracks, shifting and derailling operations.

I have been in court since the commencement of the trial, or this morning. I heard the testimony with regard to the type and character of the derailer, track switch, northbound and southbound tracks with reference to the pass track, and so forth. I am generally familiar with pass track conditions such as have been described here. (Examining picture marked "D-2".) In my experience as a railroad brakeman I was generally familiar with that type of derailer. As brakeman I had occasion to participate in shifting and storing operations on pass tracks where derailleurs of this general type are used, and rail track conditions of the same general type existed.

Q. I am not asking you what happened on this occasion—but I am asking if you have had occasion to see trains back at the rate of speed of three or four miles over derailleurs from the opposite direction from which the derailer was set?

Objection by defendant; objection overruled; defendant excepts.

Exception No. 1.

A. Yes, sir, I have.

Q. Have you had occasion to see trains proceed down the pass track over the derailleurs which were set for derailment and seen these trains proceed over derailleurs in the direction for which the derailment was set?

Objection by defendant; objection overruled; defendant excepts.

Exception No. 2.

A. Yes, sir, I have.

Mr. Hudgins: If your Honor please, that is offered also on general qualification of an expert and we ask you to find that he is an expert brakeman and an expert witness of this type.

[fol. 36] Objection by defendant.

The Court: I will let you qualify him if you care to.

Examination.

By Mr. Robinson:

I do know whether the conditions in which I saw those matters Mr. Hudgins asked about were at all similar to the conditions existing at Hurt, Virginia, on December 25, 1938, or were in any way similar, I would say, well, yes. I do not recall any specific place where I saw a train running over a derailer but I have seen it two or three times running over a one-way derailer. I do not know how many different types of derailleurs there are. I would not know how to name the type of derailer which I have mentioned. I would call it a one-way derailer. I have seen two types of derailleurs. I have seen trains running over derailleurs three or four times. The first time it ran over a frog type derailer, this kind, a one-way derailer.

I cannot say how many cars were attached to the engine. I cannot recall whether the cars were empty or not. They were traveling two or three miles an hour, I will say three or four miles an hour. I cannot tell what was the size, type

or weight of the rail on which they were traveling. I do not know whether it was 60-, 80-, 85-, 90- or 100-pound rail. I would say the rails were in good shape, but I did not examine them to see whether there were slivers on them. I do not know how many cars there were involved. I do not know whether the engine headed in first or backed in. I do not recall any specific time.

I do not recall any of the conditions surrounding any one of the three particular times. I do not recall whether a car on either of those occasions derailed on the derailer side or on the opposite side. I do not know anything about the conditions at Hurt. I do not know which side the cars at Hurt derailed on, whether on the derailer side or on the opposite side.

[fol. 37] The Court: Are you offering him for the purpose of having him found to be an expert in order to propound an hypothetical question?

Mr. Hudgins: Yes, sir. And 219 North Carolina is the latest.

The Court: I think he is entitled with ten years experience to have himself found as an expert for the purpose of expressing an opinion on the statement of facts.

Objection by defendant.

The Court: The Court so finds that for the purpose of expressing an opinion as inquired above by the Court, that the witness now on the stand is found by the Court to be an expert brakeman, experienced in the movements of trains and is therefore qualified as such expert if he has an opinion to render such on the statement of facts submitted in the nature of an hypothetical question and to which the defendant in apt time excepts, and to which finding the defendant in apt time objects and excepts.

Objection by defendant; objection overruled; defendant excepts.

Exception No. 3.

Mr. Hudgins:

Q. Mr. Holden, if the jury should find from the evidence and by its greater weight the following facts, that is assuming these to be the facts found in this case, that on the occasion when Mr. Earle Brady came to his death the pass

track ran in a general north-south direction; generally parallel to the main tracks; that the derailer on the pass track was set and in place on the east rail for the purpose of derailing cars approaching from the south out of the pass track; that the west rail on the pass track and particularly the ball and edges of the same were decayed; rusty, old and badly worn down and worn away; that the crossties on which the pass track at and about the point where the derailer was located sloped to the west; that at that time and under those conditions the car upon which the deceased [fol. 38] ceased was riding backed from the north over said pass track, at, along and over said pass track at a speed of about three or four miles an hour on the derailer, and that a derailment occurred, then based upon such facts and upon your own personal experience as a railroad brakeman do you have an opinion satisfactory to yourself as to what caused the derailment of the car upon which the deceased was riding at the time of the derailment? First, I want to know if you have an opinion?

Objection by defendant; objection overruled; defendant excepts.

Exception No. 4.

A. I do.

Mr. Robinson: The defendant objects on the ground that the witness is not qualified as an expert in that he has not shown that his experience in seeing cars run over the wrong end of a derailer on two or three occasions was under circumstances substantially similar to those involved in this case.

Secondly, because the information is based on facts not in evidence since there is no evidence on the part of the plaintiff that the wheels opposite the derailer dropped inside the alleged defective rail rather than on the outside of the rail.

Thirdly, because there is no evidence as to the number of cars backed in or as to whether they were empty or loaded cars. And because the question calls for guess or speculation or surmise upon an issue solely within the province of the jury.

Objection by defendant; objection overruled; defendant excepts.

Exception No. 5.

Mr. Hudgins:

Q. Now, what is that opinion?

Objection by defendant; objection overruled; defendant excepts.

Exception No. 6.

[fol. 39] A. In my opinion it was caused by this inferior rail.

Q. Which inferior rail?

A. Over here at Hurt.

Q. Which particular rail under those assumed facts?

A. It looks as though the west rail.

Q. That is the rail opposite the derailer on the pass track?

A. Yes, sir.

Motion to strike; motion overruled; defendant excepts.

Exception No. 7.

Cross-examination:

These derailers have a groove in them to take care of the flange in the outside track. I judge they are put in so in case they do back in over that way it would not derail a car. Consequently I would say the west rail had not been in good shape there probably could have been nothing there to have caught that flange and held that wheel. Sounds reasonable to say that there was nothing on the west rail to catch the flange. I don't know what was on the rail. In my opinion the west rail at Hurt was so defective that when the wheel on that rail opposite the derailer got there and the wheel on the other side hit the derailer, there was nothing to hold the wheel on the west rail. In all probability the flange and the wheel would have gone to the west. In other words, opposite from the derailer, because it would have been setting up. The wheels running on the west rail, which I say was sufficiently defective not to hold the flange, would make the wheels go over to the west.

I was never over at Hurt. I don't know what caused the derailment. I don't know whether the rail opposite the derailer was a defective rail or not.

You are not supposed to run trains of any kind over derailleurs, either way. It certainly would be careless to signal the movement of a train to come over on the derailer [fol. 40] if you know it is set on the rail. The use that the rail is supposed to be put to is for the wheels of the train and cars to run over those rails with the derailer off. It is a safety device altogether.

I was yard brakeman from 1918—about ten years as brakeman, and I had a great deal of experience in acting as brakeman in switching operations in sidings where there were derailleurs. In those siding operations I have very often operated the switches and the derailer, and when I wanted to come in I would open the switch and take the derailer off and then I would have my switching operations. It was the general custom to leave that derailer off until the switching operation was completed. I knew in those ten years of experience the dangers that would be involved in my signaling a train to run over a derailer and I never would signal trains, signal the engineer to run over the derailer.

Q. If you take and assume that the rails on the particular track are perfectly good rails, absolutely new, the largest size, the best size and best type, a derailer of the type Mr. Hudgins described to you, on one of those rails, would you be willing to tell this jury that when you back in there under conditions described by him it would go on over every time without derailing?

A. If the cars were not moving over three or four miles an hour, I believe nine times out of ten it would.

Q. Sometimes it would derail it?

A. Possibly.

Q. So, it is just a matter of guesswork, even if the rail is good on both sides, it is just a matter of guesswork or chance as to whether or not there is a derailment—that is a fact?

A. The odds would be against it not moving any faster than that.

Q. It would be a matter of chance?

A. Yes, sir.

[fol. 41] Starting down at the beginning at the wrong end of a derailer set on a rail and coming on up to the highest point, you have a mass of metal that rests from a half

inch up to three or four inches on top of the rail and the wheels on one side of the car have to run over that. When one of the derailleurs is resting on top of the rail that is a lot more metal on there than if a railroad spike was resting there. I have heard of trains being derailed by running over a railroad spike, but they were running probably 35 or 40 miles per hour, not 2 or 3. I don't know what speed, but much faster than that.

(Examining "D-2") That gives a fair picture or representation of the kind of derailer that I had in mind that Mr. Hudgins was asking me about as a basis for the question he put to me. That is a one-way derailer and the purpose of it is to keep cars from coming out of a pass track or siding on to the mail line and the wrong end of the derailer is set the other way from the cars you want to keep on the pass track. The part of the derailer appearing furthest towards the top of this picture (referring to "D-2") is the part or end of the derailer that is set to keep the cars from coming out of the pass track and the other end of the derailer, or north end of the derailer is the wrong end of the derailer.

Redirect examination:

When I referred to the wrong end of the derailer I meant the north end. (Examining the picture identified as "D-2") I would say the purpose of this groove shown as you look from the north end of the derailer towards the south—I would say that groove was put there so in case something like that did happen the flange of the wheel would take this groove and naturally run back and hit. That is when they backed in from the opposite side it would not derail. (Exhibiting "D-2" to the jury.) This is the wrong end. This is the end rail placed opposite the derailer. [fol. 42] You will notice there is a little groove right here and naturally when a car backs in from the wrong way, the flange of the wheel will come right over the rail and hit this groove; and as I said before, naturally if it was not moving too fast it would come right on over and hit the rail. That is when it was coming in from the north end, from the opposite direction from which it was set. The flange of the wheel is always on the inside of the track on both wheels on both sides of the cars.

Recross examination:

Q. Mr. Holden, you have already testified from your examination in chief, as shown by the picture that the flange you speak of leads away from the rail—does it not appear to lead away from the rail—so if you mounted the rail on the wrong end of the derailer, the picture shows the wheel instead of going back would turn right off?

Mr. Frazier: Which flange?

Mr. Robinson: The flange of the wheel, the wheel itself.

A. We were speaking of going in the opposite direction from the way the derail was set.

Mr. Hudgins: That is right.

Mr. Robinson:

Q. This is the wrong end of the derailer, the north end?

A. Yes, sir.

Q. You were speaking of the wheel mounting the north end of the derail?

A. Yes, sir.

Q. I ask you if the picture does not show it towards the north end the groove turned at an angle away from the rail instead of being in line with it?

A. Yes, but if this flange catches in the groove you have got protection on your rail because that groove is holding that flange in place.

Q. But at the same time this derailer shows if you mount it on the wrong end, the groove cuts to the right?

A. It cuts that way but the flange on the other side will [fol. 43] hold this side in place provided that rail is okay.

Q. You mean if the flange catches two or three inches in from the rail, nevertheless the flange on the other side will still hold?

A. I say if the wheel on the other side is in good shape and the spikes down good, there is nothing else it can do.

Q. I ask you if the wheel on coming that way and be turned from the inside of the track, if the pressure on the other wheel on the outside rail would not pull the spikes out and turn the rail over with that weight?

A. That would altogether depend on how the cars were loaded.

Q. It would put a terrific load on the opposite side?

A. Yes, sir.

Q. And I ask you if the thing you told the jury might happen if it would not put a terrific pressure there?

A. Of course, there would be pressure there all right.

J. D. HERITAGE testified: I live at 607 Greene Street, Greensboro, and I am with the Greensboro Motor Car Company—Sales Manager. I have had railroad experience on the Atlantic & Yadkin Railroad at Mt. Vernon Springs; on the section and on Pomona Yards at Greensboro as brakeman for the Southern Railway. I had ten years experience as brakeman, switching in the yard, making up trains, I had occasion in the performance of my duties regularly to perform work in connection with pass tracks, switch and storage tracks and in the performance of such work I became familiar with railroad switches, derailleurs, rails, cross-ties and other similar equipment and devices. I worked for the Southern Railway Company as brakeman for ten years—the entire time. (Examining picture marked “D-2”.) I have seen derailleurs of that exact type in operation. I have had personal experience as a brakeman in handling operations in and out of pass tracks where that type of derailer [fol. 44] was actually used, and I have had occasion as a brakeman to set derailleurs of that type.

Q. Have you even seen a cut of cars pass over a derailer of that type from the direction in which the derailer was set?

Objection by defendant; objection overruled; defendant excepts.

Exception No. 8.

A. I have seen them go to it.

Q. Have you ever seen a cut of cars go on to the derailer from what has been called the wrong end, that is, the opposite end from which the derailer is set?

Objection by defendant; objection overruled; defendant excepts.

Exception No. 9.

A. Yes, sir.

The Court: At this point, obedient to a previous ruling and advertent to the length of service that the witness testified that he had served for the Southern Railway Company as a brakeman, the Court is of the opinion and so holds that the witness is an expert, qualified to speak on and to answer an hypothetical question along the line of his qualifications as an expert, and for that purpose and that purpose only. Objection by the defendant to the foregoing ruling.

Objection by defendant; objection overruled; defendant excepts.

Exception No. 10.

Mr. Hudgins: Let the record show that the previous question asked by counsel for plaintiff was designed to go to the qualification of the witness as an expert.

(Witness resumes): I have been in court all day and have heard the testimony of all of the witnesses with respect to the nature and character of this pass track on which Mr. Earle Brady came to his death, and I have seen the diagram on the floor.

[fol. 45] Q. Mr. Heritage, if the jury should find from the evidence and by its greater weight the following facts, that is assuming these to be the facts found in this case, that on the occasion when Mr. Earle Brady came to his death the pass track ran in a general north-south direction, generally parallel to the main tracks; that the derailer on the pass track was set and in place on the east rail for the purpose of derailing cars approaching from the south out of the pass track; that the west rail on the pass track and particularly the ball and edges of the same were decayed, rusty, old and badly worn down and worn away; that the cross ties on which the pass track at and about the point where the derailer was located sloped to the west; that at that time and under those conditions the car upon which the deceased was riding backed from the north over said pass track at along and over said pass track at a speed of about three or four miles an hour on to the derailer, and that a derailment occurred, then, based upon such facts and upon your

own personal experience as a railroad brakeman, do you have an opinion satisfactory to yourself as to what caused the derailment of the car upon which the deceased was riding at the time of the derailment? First, I want to know if you have an opinion?

Objection by defendant; objection overruled; defendant excepts.

Exception No. 11.

A. I do.

Q. What is that opinion as to what caused it?

Mr. Robinson: Defendant objects on the ground that the witness is not qualified as an expert in that he has not shown that his experience in seeing cars run over the wrong end of a derailer on two or three occasions was under circumstances substantially similar to those involved in this case.

Secondly, because the information is based on facts not in evidence since there is no evidence on the part of the plain-[fol. 46] tiff that the wheels opposite the derailer dropped inside the alleged defective rail rather than on the outside of the rail.

Thirdly, because there is no evidence as to the number of cars backed in or as to whether they were empty or loaded cars. And because the question calls for guess or speculation or surmise upon an issue solely within the province of the jury.

Objection by defendant; objection overruled; defendant excepts.

Exception No. 12.

The derailment would be due to the defective rail on the west side, on the west track. The derailment would be due to the defective rail on the west track (Witness examines picture marked for identification "D-2"). Looking at the derailer from the north end or the opposite end from which it is set I observe a groove in it. That groove is to keep your wheel from dropping over on the outside of the rail when the car approaches from the north in the opposite side from which the derailer is set. When the flange of your wheel comes along here (indicating) it comes on the inside of that groove. If you will notice here, this groove runs out

to right here. The high part of the derailer starts in there. That naturally would keep it from going on over. The flange of the wheel comes right up in this groove and drops over here and this groove being in line, the wheel would naturally come down on the rail because this high place in your derailer here would keep it from sliding along. If the derailer were out of line to the west it would have a tendency to twist your truck or wheel this way, causing it to drop off or force this wheel on this side to the west. The defective west rail would not have, if the ball was going down, would not have enough ball to hold the wheel. Therefore, the wheel would climb over and cause a derailment to the west.

Cross-examination:

The wheel on the west rail, with the train going south so as to hit the wrong end of the derailer, the wheel on the west [fol. 47] rail, if the rail was defective, would go over to the west. The east wheel would drop in between, but the wheel on the alleged defective rail would go outside rather than drop inside of the rail.

When I testified here before, I testified that the wheel would drop off inside of the rail. That question was never asked me directly, I don't think. You asked me about the derailment going to the north, if I remember correctly, which would throw the west wheel on the inside.

Q. Mr. Heritage, I ask you if in answer to a question by the attorneys for the plaintiff, not by me but in answer to a question by the plaintiff, reported to begin with on page 25 of the record of the previous trial—"Q. Now you can explain?"—I will ask you if you did not say this, "Well, the derailer is so constructed that it throws the car off. In other words, there is a flange that raises the wheel up. The flange extends up in order to turn that wheel off the rail. That would be going north at that particular place. In going south, that flange at that speed would have a tendency to keep that wheel in line with the rail. If the rail had not been worn and crumbled at the edge, if I remember correctly the gauge is four-eight and a half standard gauge, and if there is a quarter or one-half of an inch taken off of the rail, when you raised the wheel on the other side, naturally the wheel will drop inside the rail and cause a derailment;"—did you not testify to that?

A. Yes, sir.

Q. And does not that statement as to what you have just testified starting out by saying "in going south, that flange at that speed," and so forth?

A. It says "in position"—it says in going south when the derailer is set in a derailing position.

Q. You qualified here as an expert before about this?

A. Yes, sir.

[fol. 48] Q. So when Mr. Frazier or Mr. Hudgins, I forget who was asking you those questions, you understood that this cut of cars when it hit this derailer was going south, did you not?

A. Yes. I understood that.

Q. And you were talking about the fact of this defective rail on the opposite of the derailer as the cars went south and hit the wrong end of the derailer, were you not?

A. That was hitting it from the derailing position.

Q. Did you not say, "In going south that flange at the speed would have a tendency to keep that wheel in line with the rail. If the rail had not been worn and crumbled at the edge—if I remember correctly the gauge is four-eight and a half standard gauge—and if there is a quarter or one-half of an inch taken off the rail, when you raise the wheel on the other side, naturally the wheel will drop inside the rail and cause a derailment"—you said in going south?

A. Yes, that is what it says (examining).

Q. And you knew then and know now that his question meant in going south, you were going to hit the opposite end or wrong end of the derailer?

Objection by plaintiff; overruled; exception.

Q. You knew that?

A. When the cars were moving south it would hit the wrong end of the derailer.

Q. And you were speaking about what would happen when the car came along and hit the wrong end of the derailer going south?

Objection by plaintiff; overruled; exception.

Mr. Hudgins: He did not say whether the east or west wheel.

The Court: Go ahead.

Mr. Robinson:

Q. When you were testifying, you were testifying about the car going south hitting the derailler at the wrong end?

A. Yes, sir.

[fol. 49] Q. And you were talking about what would happen to the wheel on the rail opposite the derailler if that rail opposite the derailler was worn and defective, were you not?

A. According to that—

Mr. Hudgins: Let him finish.

Mr. Robinson: Pardon me.

A. (continuing): May I see that picture of the derailler just a moment—Mr. Robinson, I will be glad to show you.

Q. I am asking you what you testified before—I am not talking about this picture now—that is what you were swearing to here before?

A. According to that, yes, sir.

Q. And you said the effect would be to make the wheel on that alleged defective derail drop inside?

A. Yes, sir.

Q. That is what you swore to before?

Mr. Frazier: In fairness to the witness, which wheel are you talking about?

Mr. Robinson: I beg your pardon.

Mr. Joyner: You made a mistake.

Mr. Robinson:

Q. You said the effect of the defective condition of the rail opposite the derailler would cause the wheel on the rail opposite the derailler to drop inside that rail, did you not?

A. Yes, sir, according to that testimony there, I did.

Q. Do you think that is wrong?

A. No, sir.

Mr. Hudgins: You can explain that.

Mr. Robinson: Certainly.

Q. Do you think there is anything wrong about the reporting of that?

A. If that flange catches that—

Q. Answer that first. Do you think that testimony is incorrectly reported?

—No, sir, I did not. I think that is the statement. That [fol. 50] statement there was made subject to this flange catching in this groove. Now with the track worn and out of level as much as it was would more than likely catch on the outside of this right here (indicating). It is the extreme left-hand edge of the derailer—it would come on the inside of the extreme left-hand—it would be the extreme west-hand side, and would force the rail on across over here; across the west end rail.

According to my testimony as you read there, I did say that if the flange caught in this groove (indicating), and this rail was worn, that it would drop down. I say with reference to this picture; Exhibit D-2; that by reason of the defective or worn condition of the west rail, or the rail opposite the derailer, that when you get a cut of cars in and hit the wrong end of the derailer, it might cause the wheels of these lead cars instead of going into this groove which I spoke of on the derailer to go outside of this flange here, so that would throw the car to the west.

(Illustrating to the jury) Right here is the flange that we speak of and the groove. If your track was the right gauge and this derailer was in line, your flange of the wheel comes right up here and catches in that groove and comes right on across. If this rail over here is defective badly, it is possible for that wheel to catch on the outside of this. This is sloping here and it would force the wheel down causing the wheel on this side to jump the track to the west. As a condition of the wheel on the derailer side coming on the outside of the flange, the rail on the opposite side would have to be badly defective.

The ball of the rail is the top. Here is a picture of the rail and the top part is the ball. Before you would have that result I would say—I cannot say definitely—but I would say three-quarters of an inch of the ball would have to be worn away. Assuming that it is an 85-pound rail, I would [fol. 51] say that the ball in its original condition would be two and a half or two and three-quarters inches wide. I would say it would have to be worn down from a half to three-quarters of an inch for this result that I mentioned to be accomplished. Wearing away both the top and the sides of the rail would disturb the gauge of the track. When I said half to three-quarters of an inch I was speaking about from the top. I mean if it were worn off at the top

or flown even; I mean by the rail flowing that works across from this side to this (illustrating). It would decrease it from this side (indicating) from the inside, and that would disturb the gauge. It would make the gauge of the track wider. My idea is not altogether that the defective condition of this rail opposite the derailer would cause the wheel in hitting the wrong end of the derailer to go outside of the flange because the gauge of the track had been widened because of the defective rail opposite the derailer.

Another element that would enter into it is the level of the track. If you have a pan of water and you tilt it to one side (illustrating), that is about how it would be. The level of the track would not have anything to do with whether the rail was defective or not. The level would not otherwise than just the difference of the top of the rail was worn down. That has nothing to do with the level of the roadbed. I answered a question of Mr. Frazier or Mr. Hudgins to the effect that these wheels were taking this action because of the defective condition of the rail opposite the derailer, if the level of the track, I believe. I am not positive about whether I added that awhile ago—whether I stated that to either one of those gentlemen.

The worn or defective condition of the rail that I speak of would have to play a part in widening the gauge of the track to accomplish this result that I mentioned. That would widen the gauge. That would be one of the main factors in my opinion to make this wheel go outside; that [fol. 52] and the track being out of level, and this side being low. The weight of the car would throw the west wheel right against the west rail, leaving the flange of this rail outside. My testimony on the previous trial shows that I stated that the reason was the rail on the opposite side from the derailer being defective would make the wheel on that alleged defective rail drop inside by reason of that rail being defective, the gauge of the track was widened, with the flange of the wheel going into the groove. I never said anything at that time about whether the track was level or not.

I was brakeman approximately ten years and during that time I was engaged on switching operations of all kinds as a brakeman and I had experience with railroad tracks, pass tracks, sidings, turnouts, switches and derailleurs. Derailleurs are very frequent things in connection with pass tracks and sidings and you have derailleurs all around every operation

on any track that is downhill leading to the main line such as the track at Hurt, Virginia. There are various derailleurs around Greensboro.

In the performance of my duties as brakeman I very often signaled engineers to back into sidings or pass tracks during that ten years and quite frequently, in addition to the switch, they had a derailer. Before I signaled him in I saw that the derailer was off the rail. We usually had two men with the engine all the time. Sometimes I was giving the signals. I was out in the field sometimes and sometimes I was on the engine. If I had two men lots of times they both gave the signals to come in. I very frequently gave those signals to come into a siding. During that ten years I never signaled for an engineer to come into a pass track or siding with the derailer set to derail. I have many times signaled for them to come in when I made sure that the derailer was off of the rail. It is the usual, ordinary and customary practice and rule to take the derailer off before you begin switching operations into a pass track or [fol. 53] a siding and it is the ordinary, usual rule and custom to leave it off until switching operations in that track have been completed.

Plaintiff rests.

MOTION FOR NON-SUIT AND DENIAL THEREOF

At the close of plaintiff's evidence the defendant moved for judgment as of non-suit. Motion denied and defendant excepted.

Exception No. 13.

DEFENDANT'S EVIDENCE

J. T. SANDIGE (admitted to be an expert photographer) testified: At the request and expense of the Southern Railway Company, I went to Hurt, Virginia, to take some pictures. I took views of certain portions of the track there as requested by a representative of the Southern Railway Company and I was paid by it for my services. I took the picture marked "D-1" with the camera at the height of five feet. It is facing south and the picture shows the target and derailer. That was the purpose of the picture.

Defendant offers in evidence the picture above referred to and the same is marked Exhibit D-1. (Nine copies of this exhibit and nine copies of each of the other pictures or photographs hereinafter mentioned as Defendant's Exhibits will be filed with the Clerk in accordance with Rule 19(7)).

The Court: The pictures, gentlemen of the jury, are offered for the purpose of illustrating the testimony of the witnesses who may use them. It is competent for that purpose only. It is not competent as substantive evidence but only to illustrate the testimony. It is offered for that purpose without objection and admitted for that purpose.

(Witness resumes): The picture which you hand me marked "D-2" is a close-up of the derailer. Camera height three and one-half feet. It is facing south.

[fol. 54] Defendant offers in evidence the picture above referred to and the same is marked Exhibit D-2.

The photograph that you hand me marked "D-3" is a photograph of the inside rail with the derailer in the foreground. The camera height is two and one-half feet, facing west.

Defendant offers in evidence the picture above referred to and the same is marked Exhibit D-3.

The photograph that you hand me marked "D-4" is a picture of the inside rail. The camera is 3½ feet in height, facing south.

Defendant offers in evidence the picture above referred to and the same is marked Exhibit D-4.

The photograph which you hand me marked "D-5" was taken to show the condition of the outside rail. Camera height 3½ feet, facing south.

Defendant offers in evidence the picture above referred to and the same is marked Exhibit D-5.

The photograph which you hand me marked "D-6" is a shot looking north showing the derailer, track gauge, switch and background. Camera height is about 5 feet.

Defendant offers in evidence the picture above referred to and the same is marked Exhibit D-6.

I took the photograph which you hand me. This is a shot looking north showing the rear end of a car in the train, the wheels of which are even with the derailer on the right or east side of the track. The derailer is in an open position for the track. It is off of the track. I did not get

the height but the approximate height is about five and one-half feet.

Defendant offers in evidence the picture above referred to and the same is marked Exhibit D-7.

[fol. 55] (The Court instructed the jury that all of the above mentioned photographs were offered and admitted for the purpose of explaining the testimony of the witnesses and not as substantive evidence).

The first six pictures which you showed me were made on Thursday, March 19, 1942. I took the picture marked "D-7" one week later on Wednesday. I took it a week later instead of the same day as the other six pictures because I did not go prepared for enough films to take any more pictures. I ran out of films and had to go back for that reason.

Cross-examination.

They told me what they wanted in the pictures and I placed it in order to get that. They did not tell me what they did not want in the pictures. They told me what they wanted, and I put my camera at the point I thought would get a good picture of the object. I will give you the approximate distance from the place where my camera was stationed up here to the derailer in "D-2". I was not asked to measure anything. The approximate distance from the derailer is about five feet. That is the view looking south. I did not take a close-up view of the derailer looking north. The only two shots looking north, I think included the derailer but not a close-up. The only close-up looking at it is from what we have been calling the wrong end. I did not take a close-up view of the right end.

In the photograph marked "D-1" the distance from the camera to the derailer is about 15 to 20 feet. I did not make any actual measurement on that. The photograph marked "D-3" is a view looking directly west across the rail and the camera was about one and one-half to two feet from the derail at that time, so that the angle from where my camera is located in this particular picture, the first thing that could come within the lens is about two and a half feet away, a slight downward tilt. If you don't have [fol. 56] your camera correctly set you can tilt it so that it makes large things look very small and small things very large. You can have photographs that will show all sorts of curious things if you do not have your camera right. I

have seen pictures where fellows' feet look like they are about twenty times as big as they are.

"D-4" is a view looking straight south and the camera was about thirty or thirty-five feet back from the derailer.

"D-5" was taken with the camera about 35 feet north of the derailer. In the pictures there you can see some little edge and what looks like broken pieces on the outside edge of the west rail. I have a shot of the inside the same distance from the derail. "D-4" is the one I was thinking about. Comparing "D-4" and "D-5", one is the outside of the west rail and the other is on the inside. "D-4" is slightly closer, about 5 or 10 feet.

It was about 2:30 or 3 o'clock.

Q. In other words, the sun was slanting against the west rail side at that time of day?

A. The sun was shining on that side of the railroad.

Q. So that made it, taking the picture at that time of day, you got a good clear picture of the outside of the rail but the inside of the rail would be a shadow, would it not?

A. I don't agree with you.

Q. You mean the inside of the rail would not be shadowed by the sun?

A. You can see by the pictures.

Q. To illustrate—if I stand with a stick up here (illustrating) in the evening will there not be a shadow on the east side of the stick, huh?

A. It was not that late in the evening.

Q. After 12 o'clock it will begin to shadow on that side, [fol. 57] will it not?

A. It does not do it here.

Q. In other words, your picture has got the sun changing its location?

A. No, that is not my explanation of it. That is not the exact position of the compass, due south, but for explanation in Court we are saying it is south.

Q. Let's see—the flange or top of the rail shades the fin of the rail, anyhow?

A. Some, yes.

Q. That is what makes it so dark on the side of the rail, shading?

A. Yes, it is shaded.

Q. No. 6 was looking north, I believe?

A. (Examining) Yes, sir.

Q. And how far was the camera south of the derail when that was taken?

A. About 20 to 25 feet.

Q. I call your attention now to No. 7, and I ask you to look at the black spot on the east side of that car and see if the picture does not show that the sun was making a shadow?

A. (Examining) This is a different day.

Q. You said one week's difference?

A. I did not go down at the same time of day though.

Q. What time did you go?

A. About 5 o'clock, much later.

Q. The only difference was in the length of the shadow?

A. And the side, too.

Q. Because the sun was further around to the west?

A. It would change it from the side and from the length is all.

Q. How many times before have you been called on by the railroad to make pictures for them?

A. I have made pictures but I don't know whether or not for the Southern Railway Company but I have made railroad shots. I never testified on railroad shots before.

[fol. 58] Q. But you have served them?

A. I have served them.

M. V. DRINKARD testified: I am Section Foreman at Hurt, Va., with the Southern Railway Company, and held that position on the 25th day of December 1938. I live at Alta-vista, which is one mile from Hurt. Hurt station and the main line and pass track that I have heard talked about here are in my district and under my supervision as Track Foreman.

I tried a gauge on the track the evening before December 25, 1938, and then after the derailment I tried it again, after we got the cars up. This was a routine regular operation on my part. That was Christmas Eve, December 24, 1938.

(At this point the defendant has a derailler brought into the courtroom and set up).

I have been employed by the Southern Railway Company for 23 years, and have been engaged in inspecting and looking over tracks during that time. I have been in that work all that time. I have been Track Supervisor since January

1937. I am familiar with this siding that is involved in this case at Hurt, Va. It was laid down January 1936, Brand new, cypress cross-ties were used. I am familiar with the condition of the rails that were used in that pass track. When they were put in they were all right. They are good still. None of the rails or cross-ties have been taken up and that track has not been changed in any way since December 25, 1938.

I gauged the track on the afternoon of December 24, 1938, before night, about every four feet, all the way through. I would gauge between opposite rails several times. A rail is 33 feet long. These rails that I have in front of me weigh 85 pounds. The rails on the siding at Hurt, Va., were 85 pound rails. This derailer (indicating), was not the same derailer that was on the track at Hurt, Va. That derailer is still there. It has not been removed or changed in any [fol. 59] way since the accident. No part of the cross-ties or track have been changed in any way.

There was no light on that derailer at that time and none there yet. There never has been one. None there yet. That section of track at Hurt is in the automatic block system.

The object at which you are pointing is a track gauge just like the one I used, standard gauge.

Defendant offers the rail, track gauge and derailer in evidence for the purpose of illustrating the testimony of the witness and the Court instructs the jury to this effect and that they are not to be considered as substantive evidence.

The standard width of a track between rails is 4 feet 8-1/2 inches. I know of my own knowledge that the width of the siding at Hurt, Va., is 4 feet 8-1/2 inches. The purpose of a track gauge is to keep the track to gauge. We would not have any way to keep the gauge, if we did not have something like that to gauge it. If the two flanges at the extreme ends of the track gauge fit in snugly between the rails that indicates that the gauge of the track is 4 feet 8-1/2 inches. It puts it right to it.

When I gauged the track at Hurt, Va., I did it with a track gauge exactly similar to this one as to the width of the flanges and the distance between them. I gauged this siding at a distance of 4 or 5 feet apart the entire length of the track on December 24, 1938, back down to the point of the switch at each end. The track gauge fitted right up

to 4 feet 8- $\frac{1}{2}$ inches and is still that today. At and near the derailler the width of the track was 4 feet 8- $\frac{1}{2}$ inches.

I was not there at the time the accident happened. It happened at 6:30. I got there a few minutes after 7. I found [fol. 60] them 3 cars on the ground, just one truck on each car, the front truck on each car. The cars were being backed in to the south. The front truck of the first car to the south was off on the west side. The first truck on the next car was off on the east side. The front truck on the third car was off on the west side and the front truck on the fourth car was off on the east side. None of the trucks of the four cars except the front trucks of each one came off the track. I saw marks on the cross-ties of the wheels of those trucks that came off. They were on both sides. They are there today.

I did not substitute any new cross-ties in the pass track. The marks made on the cross-ties were not sufficient to damage them in any way in my opinion. They were all right and are still all right. The rails, especially the rails at the derailler are in good shape. They are the same as the rails all the way through. I did not remove or replace any of them.

I was frequently present before December 25, 1938, when trains were run into this siding. Every day. Forty-eight hundreds, whole trains, would run in there, freight and passenger. A forty-eight hundred engine is a freight engine which weighs about two hundred some tons. It is a larger size freight engine. I have seen hundreds of cars run in there. I saw that happen every day before December 25, 1938, for one year. I saw it almost daily from the time the pass track was put in until the accident happened. The pass track was completed the last of January 1936.

I have seen engines and cars being run in and out of that pass track every day since December 25, 1938, size forty-eight hundred engines.

There are some slivers on the outside of the west rail. There are some there now, that is three or four years later, three any way. We have got them on the main line on the outside. I have never seen any on the inside. There are [fol. 61] none on the inside here. Nothing has been done to the inside of these rails since the accident. (Examining "P-2") I have seen slivers of that size on the outside of the rails there. No slivers on the inside. It is not possible for any slivers to accumulate on the inside of the rail of that

track being used daily with forty-eight hundred engines running in and out. The flange of the wheel keeps it cut off. "D-7" is a good picture of the rails just at the derailer with the derailer open and with the coal car just over the top of the derailer.

"D-2" showing a down view of the derailer shows a mark on that derailer. The flange of the wheel cut down in there. The flange, when it goes over the derailer, always cuts drainage in there. That is what that is on top, drainage cut in there by the flange of the wheel. I saw that on the actual derailer at Hurt.

"D-5" shows somewhat the outside of the rail opposite the derailer and it appears to have these slivers on it. If you had taken two slivers the size of those introduced in evidence by the plaintiff it would have left gaps, as shown on the picture. They are both on the same side of the rail.

The picture marked "D-5" shows a track gauge put down on the track right at the derailer. I put the track gauge on the track and had a picture of it taken. That is it. It is just like that track gauge right there on the floor. It is a different gauge but the same make.

Nothing was done on that track between the time the picture was taken and the day of the accident. It is the same thing. It was just like you see it there.

Cross-examination.

My duties as Section Foreman are to look after the track and if anything is wrong with it or if the T-irons are not in shape that is my responsibility. The T-Irons in the track at [fol. 62] Hurt, Va., were made in 1912, I believe. The west rail was made in 1912. The height of the ball of new 85-pound rails is 5-1/2 inches or 5-1/4 inches. We always measure the whole. The thickness or height of the ball of an 85-pound rail is about an inch and a half. I don't believe I ever measured a 100-pound rail. The width of the top of an 85-pound rail is about an inch and three-quarters. I have not measured a 100-pound rail; I couldn't tell you. I don't measure rails like that. I just know the pounds. I decide what rails will be put in a track. In this case when I put rails in, instead of putting in new rails I put in old rails. I took them off a track that had been used—just flowed there. It had not been used so much that it had flowed both ways; it had been in the switch point, I think, where the switch goes out through. It came out of the main

line track of the Southern Railway Company below Greensboro. They took it out in 1936, and sent it straight on up there the first of January.

The derailer had a place for a light to go on it, a little prong sticking up on the target, you can put targets on it. A light is not necessary in a place like that. You can put one on it. That is not what the thing is for.

I am familiar with the Southern Railway Company's rules of the operation department (examining page 77 of the Rule Book), that is the light that goes on a signal track. This is not a signal track—main line. On a signal track they have no automatic signals to take care of them. We have this on there where we don't have automatic signals. We do have automatic signals here. It was in the cut a little over half a mile south of the derailer. We don't need one on that derailer. They are not signal tracks, they are on the main line and you don't put them in side tracks with targets on it. They never had kept any on this derailer. I have known about it for a good while. I helped build the track and still do.

[fol. 63] Q. Will you tell us what length of the flange of a car wheel is (indicating), this thing here—this gauge, it has a little thing that sticks over on the inside. Is that sort of the way the flange of the wheel fits over on the inside, that little thing?

A. Yes, sir.

Q. What is the length of that on the ear wheel—how far does it protrude down or across or along the side of the rail?

A. I imagine about an inch or close to an inch and a quarter.

Q. In other words, your idea is that the flange of the wheel is nearly as long as the width of the track?

A. No, sir.

Q. I thought you said the width of the track was not but about an inch and three quarters?

A. That may have worn down.

Q. What may have worn down?

A. That rail may have worn down. That one there is worn down (indicating).

Q. You mean this rail here is worn down?

A. Yes, sir.

Q. I am not talking about the rail but am talking about the flange of the wheel?

A. They will go down as the rail goes down.

Q. But they are never any longer or shorter—the rail has nothing to do with the length of the flange—that is made on the wheel and stays the same no matter what sort of rail it travels over?

A. It wears down as well as the rails.

Q. I don't think you understand what I am trying to get at. I am trying to get at what is the length of the flange of the car wheel before it wears down?

A. About one inch.

[fol. 64]- After the death of Mr. Brady I went up there. I had charge of the wrecking crew. I helped clean it up. After the cars ran over the derail they ran three car lengths south of the derail. Those cars were about 30 feet long, I reckon. The train went three car lengths and stopped at the derail and they dropped off at the derail and stayed there. Before having jumped off they went about 75 or 80 feet, or close to that, before the train came to a stop.

I know how long it takes to stop a train going at the rate of 3 miles an hour. It just depends, if he sees the signals. If he gets the signal he can stop right now.

C. W. ASHBY testified: I am Superintendent of the Danville Division of the Southern Railway Company, which includes Hurt. I have been in the railroad business 22 years, and I have been employed by the Southern Railway Company during all that time. I have been Superintendent of the Danville Division since October 15, 1938. I was Superintendent of the St. Louis-Louisville from October 1937, to October 1938.

Practically all of my time with the railroad I have been around tracks, switches and so forth. I am familiar with rules and custom in regard to switching operations. We don't have any derailleurs in pass tracks but we do have them in storage tracks. In other words, storage tracks are not so thick but we have derailleurs in industrial tracks and in tracks on which cars may be left. We have a good many tracks in this Division on which cars may be left and we have derailleurs on them. Derailleurs are very frequently used and familiar to railroad employees, including breakmen.

As a general rule, when a crew goes in a storage track to switch they do not replace the derailer while they are switching in and out of there. It is not good or proper or

careful practice for a brakeman, to signal the engineer to come into a storage or pass track against the wrong end of a [fol. 65] derailer set to derail.

In my experience I have seen cars backed over and hit the wrong end of the derailer, I reckon 25 to 50 times. Sometimes the cars would stay on the track and sometimes off. Sometimes one truck would derail, sometimes double trucks and sometimes both would jump it. I recall one instance two or three months ago that the baggage car was backed over the wrong end running probably five or six miles an hour and both trucks stayed on. In the 25 to 50 times that I have seen cars hit the wrong end of a derailer my recollection would be about a 50-50 break on the thing one way or the other as to when they did run off as compared to when they did not run off. I think I recall an instance when a car was derailed at a passenger station running two to three to four miles an hour, somewhere in that neighborhood, and both trucks were derailed.

I have knowledge about the installation of the siding at Hurt, Va. My recollection is that it was the first part of 1936. I had occasion to go there and see that track since 1936 and prior to December 25th, 1938. I was Trainmaster on the main line of the Danville Division, which takes in the Hurt territory, the latter part of 1935, until I left to go to the St. Louis-Louisville Division as Superintendent in 1937. Since then I have been back and part of my duties have been to observe the general conditions of the railroad. I observed this track in my travels over the railroad. Part of my duties was to make track inspections.

I don't recall whether during that period I got out and went along there, but I passed there and observed it from the back of the train. I did observe it many times on the ground shortly after the installation of the track. I was up there about the 24th of March 1942. I went up there with you. We got out and looked at the track. I saw and knew the condition of the track when it was put in. In my opinion [fol. 66] the condition of the track today is just as good as it was at that time with the possible exception of traffic causing it to go down and settle on the new fill. It is an old track, the fill was new and in parts of the track—I am speaking of the whole track now. As to the siding, including especially the point at the derailer the condition of the track there today is just as good as it was the day it was put in at that one point, at and near the derailer.

The track is used practically daily, and before this. Hurt has a connection with the Virginia Railroad on which we receive very heavy deliveries of coal. I would say 70% of it goes north, at least 66-2/3% goes north. The track in question is used as a storage track on which local trains and other trains go there and pull connections and place northbound coal in that track. Sometimes they use the north end to put it in and sometimes the south but regardless of how it is put in it is all taken out of the north end of the track by through freights and other trains so instructed to move it.

The heaviest engines, forty-eight hundreds, habitually go in there. They went in there frequently before December 25, 1938. There has been no change in that track since December 25, 1938. The same kind of traffic is being handled over the track as was handled the day it was installed. There has been no change.

I went up there on March 24, 1942, for the express purpose, among other things, of carefully examining the rail on that pass track opposite the derailer and I made a careful examination of it. The rail had flowed to the outside. That caused slivers on the outside. There were no slivers on the inside of that rail and there were no slivers on the inside of the other rail. Slivers will not accumulate on the inside of a rail anywhere because the flange on the wheel cuts them off as they flow. The width of the top of the ball of the rail was decreased a little bit but not to any extent [fol. 67] that would affect traffic over it. It was not increased to any extent at all on the inside of the rail. I saw the track gauge put down there and it fit up all right. The track was to gauge, which is 4 feet 8-1/2 inches. I did not gauge the track myself but my recollection of seeing the gauge on there was that the track was in gauge, which is 4 feet 8-1/2 inches. (Examining the derailer which was in Court) I would say that the movable part of that derailer weighs somewhere about 75 pounds. It would not be easy to take that piece of metal in your hands and wiggle it around whether it was locked or not.

Cross-examination.

If that were in a defective condition and improperly attached to the cross-ties it would be difficult to move it around. It would take right much to push it. It is not

attached now but it takes right much to move it. The way it is now I say it is rather difficult to move it.

I said that I was familiar with the general condition of the rails in this pass track and with the derailer in 1936, at the time the track was installed and that I was also generally familiar with the condition of the track and rails in March 1942, some 6 or more years later. I say that notwithstanding this heavy pulling traffic on storage tracks resulting from large engines and from the supply of coal cars coming from the Virginia Railroad in six years time that this track has not worn any. That is what I said insofar as low switching operation service is concerned. We are speaking of side tracks—we are not speaking of a main line. It is not the standard custom of the Southern Railway Company when sidings or storage or pass tracks are created to take old rails that have become worn, used and in dangerous and defective condition off of the main line to put in these tracks. It is not the practice of the Southern Railway Company to use dangerous rails in any of their tracks. It is a practice of the Southern Railway [fol. 68] Company and every other railroad to use relay rails, which means to take rails out of the main line and use them in sidings and industrial tracks. We do not take it out of the main line because it is not safe on the main line, but because the rail is somewhat worn and sometimes causes the riding quality to be not so good. It is not satisfactory for the main line for riding qualities. You cannot maintain service in the tracks. When a rail has flowed appreciably to the side, when pieces of this type come off of the track it is considered safe. It is considered satisfactory for the main line. As a matter of fact upon the main line we use rails that have flown to the point where slivers of that sort come off of them and that is general practice and I consider those rails safe. We put them in the pass track because we took out 85-pound rails and laid heavier rails. We have some 85-pound rails on the main track here right now.

It is considered good railroad construction to use 85-pound rails on main tracks. We are buying 131-pounds and using them consistently if we can get them. We are not putting in any new 85-pound rails on this Division but we are on other Divisions.

I never saw a rail flown on the inside. If a rail were worn to the point on both sides where pieces of that size come

off I think it would be safe on any track. Practically all that is wrong with it is it just flowed.

Q. Mr. Ashby, in operation such as through a cut in this storage track, just before number 30 passed on the north-bound track where the entire shifting process, train which is being shifted went into the pass track and then came back with cut still on it, before the cut was made, when they went in for the purpose of permitting No. 30 to pass, when they came back out and passed the derailer and switch, whose duty would it have been to have cleared the switch and [fol. 69] turned the derailer?

A. Are you speaking of this particular move?

Q. In a move of that type?

A. There is a whole lot of difference in a move.

Q. Is it not the duty of some one riding on the last car in an operation of this type?

A. No.

Q. Whose duty is it?

A. The brakeman.

Q. Even though the brakeman is not riding on the caboose?

A. That is correct.

A man is not riding on the caboose in an operation of that kind; no one on the tail car at all. There is not, to my knowledge, a rule of the Interstate Commerce Commission in shifting operations of this type that the Railroad Company is required to keep two men on the end car. I never heard of such a thing. I don't think there is.

When I testified before in this case I said: "As I stated before, in territory where tracks on a curve there is always a certain amount of flowing of the rails caused by the wheels pushing over against the rail. As to that rail over there at Hurt, in the position as testified to, there should be no flowing of that rail because the flange of the wheel should be on the other side in backing off the curve. This rail as you might say is just beyond the curve. I might add that I am of the opinion that that rail had flowed before it was laid there."

Six years after it was laid there these slivers and evidence of flowing was still on the rail and it was still in use. There are more over there right now and still in use. I am not familiar with the rules and formulas which our Engineering Department use in condemning rails.

[fol. 70] I presume they have rules and formulas in condemning rails which they follow but I don't know what they are. I cannot answer the question as to whether as a matter of general practice and usage on different main lines rails wear out in about 15 years at the most with regular steady use. It all depends on the traffic over the rails, the size and power of the locomotive, whether the track is straight or curved. I have seen trains on 25 to 50 occasions back over derailleurs in the opposite direction from which the derailer was set—that is a guess, of course. It happens very frequently. I would say yes, I have seen it 25 to 50 times. After all I have been here 20 years. I think I cited two instances. I saw a baggage car go clear over without derailing and saw another go over and derail. Both of them were at the station and both on the same derailer.

I have seen them derail under various and sundry conditions, loaded, empty and on straight and on curved tracks. I don't think any set formula can be stated. I do not know that every time a train goes over a derailer which is set in the direction in which the train is coming it derails. I have seen switch engines go along and run clean on over and up just a little below from the direction which it is set.

The purpose of a derailer is to derail cars moving at slow speed, which they would do if they got loose in storage tracks and rolled up, and the ones I referred to were apparently tampered with. They were running 30 miles an hour. No, the derailer was not tampered with but there was tampering otherwise. I have seen locomotives under steam pass over derailleurs and approach derailleurs in derailing position at 25 to 30 miles an hour and not derail.

Re-direct examination:

Before I went to Hurt, Virginia, I was here at the previous trial when these slivers were exhibited or some that looked to be the same as these. When I got to Hurt, Virginia, [fol. 71] I did not see any slivers on the inside of the rail on the pass track opposite the derailer. There were none on the inside. I did see slivers on the outside. I saw places on the outside rail where slivers had been picked out in two places that approximately corresponded with these slivers. They were both on the outside of the rail. The track looks level to the naked eye. I have not leveled it. If there is any slope either way it is not sharp or marked.

Re-cross examination.

I don't recall whether I testified at the last trial that if the defective condition of the west rail of the storage track opposite the derailer contributed to or caused the derailment in my opinion the derailment would have occurred to the west. It may be in the record there.

Q. I am not trying to trip you—I will ask you if on the last trial Mr. Robinson did not ask you this, “Mr. Ashby, if the jury should find there was a defective rail on the opposite side from the derailer and that that defective rail contributed in any way to the derailment, do you have an opinion satisfactory to yourself as to whether the cars would derail towards the derailer or away from the derailer?” and I ask you if your answer was not, “In my opinion if that rail had contributed to that derailment, the cars would have gone to the west and not to the east as they did.” Did you say that?

A. I believe I did.

Q. And I ask you if this question was not asked you—“In other words, they would have gone towards the rail causing the derailment rather than towards the derailer?” and if your answer was not “Yes. If the rail had been low the flanges would have gone to the double track side.” And [fol. 72] this question, “And the wheels would not have dropped down between the rails? A. No sir. Q. But would have gone on the other side? A. Yes, and if the rail had broken it would have done the same thing.” Did you say that?

A. Yes, sir.

Q. You testified a few minutes ago that you had never seen a rail flown to both sides?

A. That is right.

Q. Do you recall this testimony at the former trial—“Q. I ask you if you found a rail which had worn and slivered conditions on both sides of the rail, if that rail would not be in a generally defective condition? A. I would not say defective. I would say worn but not defective, not unsafe.” Did you say that?

A. I must have if it is in the record. I probably said it if it is in that record.

Q. And this—“Q. But the reason you take them off of curves where they have flown and turned them around is because the side on which there is continual flowing has

reduced the condition and usability of the quality as to that side?" And you said—"It is naturally worn to the web"; and then this question was asked—"Q. And that is the reason you turn it around and use it on the other side? A. That is one reason"—Did you say that?

A. That is correct.

Q. And, "Q. And by that same token, if it is worn on both sides and slivered off, does that not mean the entire rail is in a generally defective condition? A. I would not say defective condition. I would say worn condition. Q. But you would not consider using a rail of that type on the main line where it is worn off on both sides as a result of continual flowing? A. I have used them where I have had to put a rail out of a side track until I could get new rails"—is that correct?

[fol. 73] A. That is right.

I did not say that I had seen rails used that had flown on both sides. When you take a rail out of a curve you can turn it and use it. It naturally flows to the outside. It can flow on the other side. That flow on the inside is cut off when the first train passes over it. When you turn it and use it, it flows to the other direction. It can be worn, but it does not flow on both sides in one position, not at the same time. I have seen plenty of rails that had flown on one side because of their position turned around and start to flow the other way. I would use that type of rail only as an emergency. I would leave it on a pass or storage track for slow speed even though it had been worn on both sides. When I said: "I have used them where I have had to put a rail out of a side track until I could get new rails", I meant if you have a derailment and you bend up or break up a bunch of rails you don't always have enough rails on the derrick to lay the main line with new rails. We maintain some new rails on the derrick.

On several occasions I can mention it has been necessary to go to the nearest pass track and patch into the main line until you can get new rails from another point on the railroad. On a storage track with this volume of traffic, at a slow rate of speed I do not think it would be unsafe to use rails that have been put in first one position and then another and that had flown on both sides.

We have not had an accident since that or a derailment since that. I do not know of another case where we have

that movement was made—when they backed out on the main line—I was at this crossing, protecting the crossing (pointing on chart). In the backing up movement I protected the crossing and then they cut out the four cars. The engine came over the crossing; cut off somewhere five or six cars south of the crossing. I was not up north of the engine when they cut the cars out. I was back up here. I rode the caboose car back. When they came on down I stayed on the caboose car and Mr. Brady stayed where the four or five cars were. He cut those out. I didn't see him. I was checking on those cars. I had left the caboose. I was not far from those twelve cars so I left the caboose to check up on the cars. While I was over there I heard the blast of the locomotive engine. I didn't see how the cars were derailed—left the track—nor did I see where Mr. Brady was at that time.

When the cars or the train was backed into the pass track to let the northbound train pass, I threw the switch and the derailer and then came back to the crossing to await the other movement—to keep from hitting an automobile.

I am familiar with derailleurs. They have a place on them for lights. They were made that way, and this one was made that way but there was no light in there. There was another derailer over on this little house track and it was a derailer of the same kind. It had the little arrangement for a light—the little prongs that stick up. There was no light on it.

After the cars had left the tracks I did not examine the T-irons, I was busy seeing if I could do anything for the man that was hurt. He was dead when I got there. When I was checking the cars Mr. Scruggs was back on the coal about three cars from the rear where I checked up, and I [fol. 76] might mention that the knuckles jammed together and closed; I mean some coupling between two cars. While we were talking about that, there was the first alarm of the whistle. I had three more cars to check. I checked them out and by that time he blowed the second alarm. I will say it is about three or four car lengths from the switch at the north end of the pass track down to the derailer.

There was nobody of my crew that was on the rear end of this cut of cars other than Mr. Brady. It was rainy. About such a morning as this one was—dark, fog, smoke, still used lanterns, hazy, misty day. Still dark at that time. We had to use lanterns. It was still not light enough

run over a derailler over there, in regular ordinary operations since then, but I understand the contention was that that rail was defective and caused it. We have not had another occurrence of this type and we have had thousands of trains in and out of there since then, too.

[fol. 74] On January 3, 1941, after due notice and upon commission duly issued, plaintiff examined L. O. Woodson and George W. Brandt, employees of the defendant, before a Commissioner, as provided by C. S. 899-902, and upon the trial defendant offered in evidence the said examination of George W. Brandt, as follows:

GEORGE W. BRANDT testified: I live here in Spencer and I am conductor for the Southern Railroad, and have been in the railroad service 37 years. I was conductor on this particular train with this particular crew. Mr. Brady was killed over at Hurt, Va. I had charge of the movement of the train on that occasion. It was our purpose to pick up a cut of about 12 cars there at Hurt. I had a message to pick them up. I also knew that No. 30 was approaching or would come by on the northbound track and I went into the pass track to let it pass on the northbound track. He was running 15 minutes late. We arrived about 5:50.

I told my men "It is no use for us to try to get those cars." I had seen room for us to back in there so we did that. We backed in from the north so that the caboose was just about up with the front or lead car of that cut of 12 cars, or 10 or 12 cars space length in there between them. That made it such that when we came back out of the pass track and we were coming back down on to the main line track to leave the rest of our train, except the four cars that were going to stay up next to the engine—the movement of the cars was back south. The engine went north with the four cars and then backed south again into the pass track and was proceeding on down to the 12 cars which were a considerable distance south of the crossing, but hitting this derailler we didn't get there.

In that movement the cars were derailed. Someone closed the derailler. I did not see the cars when they actually [fol. 75] jumped the track. I would say I was about 75 or 80 cars away. The last time I saw Mr. Brady was when he backed out on the main line before the accident. That is when they backed back to cut out those four cars. When

to see, and the engine backing in had no light like a shifter. It would not have done to go without lanterns. They had a light, but the cars blocked it off. The only light Mr. Brady had was his lantern light. There was no light at the switch. The switches do not have a device on them like derailleurs. Done away since the electric block system. If you throw the switch, it shone to the board. That switch is not operated by block. It is not a block system where you throw the switch from the tower house or anything of that kind.

After I had gotten there to where Mr. Brady was, I turned him over to the undertaker. I didn't try to get a doctor. I first handled with the Greensboro Dispatch, and told them what had happened. I made no special examination of the track afterwards. We turned the body over to the undertaker and got our train together. I made a written report to my superior officer. I gave a signed statement.

(No cross-examination.)

Mr. Frazier: In order that we may get the diagram attached to the Woodson deposition, which is offered along with that deposition, you will agree that that is the same diagram as the diagram referred to as having been reproduced on the courtroom floor?

[fol. 77] Mr. Robinson: Yes, and the one mentioned by the witnesses in their depositions.

Mr. Frazier: We cannot get this off of the floor, and we want to show that it is the same as that referred to in the deposition.

The Court: And that, gentlemen of the jury, is offered for the purpose of illustrating the testimony of the witnesses and all without objection.

HENRY PETRIE testified: In February, 1942, I was employed by the Sperry Products Company, Inc. Their business is to test rails for steel defects. That is the primary thing they do. They have other products too. I was employed by them in that connection at that time and had been for approximately five years, during which time I tested rails.

We used what is known as a detector car, which is equipped with a generator and motors so that we can test the rail electrically by instruments. That is all done auto-

matically. The car has what is known as a record tape. As it tests the rail it makes a positive indication on a chart as to what the condition of the steel in the rail is at that particular point. That chart also has what is known as landmarks. As it traverses down the rails, the driver has a push button which is operated by means of relay or rather by operation relay, and the relay in turn operates on this chart and we have various, what you might call code, signals to represent various landmarks. For instance, a short indication on the tape may represent a number pole or it may represent any other similar object that is fixed as a landmark on the right of way. The second indication represents a signal. The third indication represents a mile post; the fourth indication represents a station. A long and short means a rail entering an approach. A long and short means a rail leaving an approach.

I used this car and this kind of apparatus for five years. I have been in 33 States and five Provinces of Canada. I [fol. 78] have tested on 26 railroads, some of them three times, some of them twice, and a majority of them just once. I will say I have tested in the neighborhood of 25,000 or 35,000 miles.

I made a test for the Southern Railway Company in February, 1942, which included this storage or pass track in question here. I was making a general test over the system. I have got the record made by that machine showing the results of my tests of that particular siding. This is it (producing it). This happens to be my writing right here (indicating); this letter "C", this letter "D", and I put this stamp on here, rubber stamp marked "flow". That is just a rail defect. Of course, the word "defect" sounds like it is bad, but it actually is not. I also put this direction of the car showing that it was tested in that northern direction. The test car was going north. There is indication of the approximate location in this pass track, that is a positive indication made by the car. This little "x" represents where the derailer was located. These lines (indicating) do not represent tracks in between the rails. To anyone else looking at the chart they would not be able to interpret this. All of these lines are applicable to this siding. This represents one rail, two rails, in front of the west rail that had the flow on it and the rail itself that had the flow on it and a little greater than one-half beyond.

There is one place where I say "flow". It is one the west rail going north, directly opposite the derailer. The word "flow" means with reference to what I found in making the test a sort of a pulling off of the rail on the outside usually caused by trains going around a curve. It means the flowing of the metal causing slivers over there. I said this word "flow" represents a defect. I have not got "C" as "defect" also somewhere else.

From the result of my test as shown by that record interpreted by me, I would not consider the rails on this siding [fol. 79] or storage track, including the rail at the derailer and the rail opposite the derailer as defective. The tests show they were not defective. That is why I would not consider them as defective. Based on the tests that I have just described to the jury, the rails are perfectly sound.

The Court finds from the examination of the witness that he is an expert in that type of work and is entitled to express an opinion.

Defendant offers in evidence the paper chart referred to by the witness and the same is marked Exhibit D-8. This exhibit not being susceptible of reproduction or copying in the printed record, it is agreed that counsel may exhibit the same to the Court, at such time and in such manner as it will permit.

(Witness resumes): I have the word "derail" written on "D-8". I wrote it at the time the tape was made. The is the usual procedure we go through in marking a paper in testing territory. In this case the word "derail" indicates the location of the derail. The derail is at the particular indication that is marked on the chart "x" opposite or on the left from the word "derail" and just a little above it. Just above the typewritten word "flow" appears the letter "D". That represents joints. The letter "C" is a joint; so between "C" and "D" is one rail length. I have on here an arrow to the north indicating that the car was traveling north. The derail was off. I made this test February 6, 1942, and I have got it endorsed to that effect on "D-8", up at the top.

I did not know anything about this case at that time.

Those little chopped out places represent joints also. The scale of that tape is $\frac{1}{16}$ th of an inch equals 1 foot. In other words, the distance between the letter "C" and the letter "D". These all represent joints. As I tried to say before, when there is a particular rail in question to be

[fol. 80] examined for steel defects, it is lettered, two consecutive letters of the alphabet and it makes no difference which two you use. This was the particular rail in question so I lettered it "C"—"D". I found it in good condition. The car did not even stop. The principle of the car is such that it must be going at least six miles an hour to make a satisfactory test. The car was doing that particular speed and I made that chart and looked at the rail and I have tested so many of them that looking from the car and knowing how the car operates, I did not bother to stop for that particular rail. (Showing chart to the jury.)

I made this test on February 6, 1942, and was then employed by Sperry Products, Inc., and this car I was in was a Sperry Detector car No. 132. I did not know anything about this case at that time other than I heard there was a particular rail in the siding that was questionable as to a defect and they wanted it tested and that test was made by me in connection with testing the whole line. They told me that the rail in question was in this siding at Hurt. That record was made at that time by that car.

Since that time I have left the employment of the Sperry Products, Inc., and have entered the employment of the Southern Railway Company, March 27th, about two weeks ago. At the time I made this test I did not know that I was going to enter their employment and did not have any negotiations with them at the time.

Cross-examination:

They did not give me a job because they were so pleased with my tests. They gave me a job and they had not given me one until I made the tests. I did not ask them how long it took them after I made the tests to give me a job. I don't know. It was February 6th to March 27th, so they did not wait sixty days to give me a job. I just ride along on the train and let the detector do the detecting. It is a [fol. 81] device that tells you when you hit a bad rail, but it does not write down on there what is the matter with the rail. I do that, I interpreted the indications, the little marks. No one knows the code but me. I see a little mark on there and I think that should be marked "flow" and I mark it "flow" from my interpretations. This tape can be divided into two parts. You can draw a line down the center of these lines and that will represent the rail on that

side (indicating) and this will represent the rail on that (indicating) side. All three of those lines represent one rail.

The three lines there tell about the condition of the rail. It takes three lines to do that. In this I used three. I did not design the card. The margin does not have three lines so as to make different types of complaint. There is no reason at all to have three lines. The marks on some of these lines are different from the marks on the other lines because that is the way the car operates. Why it operates that way is a hard question to answer. On the top line I have two little dots like that (indicating) and in the next one I only have one at the same place. That is from the motion or disturbance that has been set up on the rails—a disturbance of the field—the magnetic field set up around the rail. Not a disturbance in the rail, a disturbance in the field.

I believe I said there was a magnetic field set up around the rails and those indications are marks—these little hickies—represent the various disturbances in the field. The center of the magnetic field is the rail and if there is a defect in the rail it affects the magnetic field, it disturbs the field. So a disturbance in the field means a defect in the rail. The machine put those marks there because it showed some disturbance in the rail. Where I have two lines on the top and one on the next, that is the same disturbance. I don't know how big it is. I gave two indications before because it is greater but how great I do not know, whether two or three times. I made it two instead [fol. 82] of one because it is greater. (Examining bottom line in "D-8") That is a joint. That is a series of disturbances. From the time it hit the point, there is a disturbance because there is a break in the magnetic field. I have a little mark there right in between two joints, right where the word "flow" is. So that means there is a disturbance in the magnetic field right where that "flow" was. Flow is considered as a defect.

I never did make an examination of that pass track with my car before this happened. I was not here at the last term of Court when this case was called. Mr. Brown, the Trainmaster, asked me to come down here and make this examination and he went along with me.

In my experience in the railroad field I have not had occasion to see how a railroad T-iron is rolled in the mill.

The whole rail is made of the same material and is the same quality throughout. The top of the rail is not rolled especially. I know from in school. I have studied it. I have never seen one rolled. I do not know how the top is rolled with reference to the rest of the T except by my studies. I know what the ball of a rail is. I know approximately how high or thick the ball of an 85-pound rail is. I have never measured a rail. I don't know what the usual thickness of an 85-pound rail is. It is approximately an inch and a quarter. The ball of a new hundred-pound rail is probably $1\frac{3}{8}$ inches. I have never measured one. The width of a hundred-pound rail is approximately $2\frac{1}{4}$ inches, and the width of an 85-pound rail is about 2 inches. I do not know the width of a car wheel not including the flange. I do not know the depth of the flange. I never measured a car wheel.

Redirect examination.

Where my tape shows what I call a disturbance or something set up in the magnetic field indicates a defective rail. It shows a break. A break is a disturbance—it will show it. [fol. 83] A disturbance in the field is set up in the rail and will cause an indication, but that does not necessarily mean that the rail is a dangerous rail. My job has been to tell the railroads where the rails should be taken out of the track. I did not tell them to remove any rail on this siding or storage track, because the rail is sound.

Recross examination.

I did not overrule the detector. I merely interpreted the detector.

Q. But you overruled it?

(No answer).

Redirect examination.

When I ran over the joint later, that shows one of the disturbances.

C. K. CARTER, JR. testified: I am T. Linmaster with the Southern Railway Company and was on December 25, 1938. My territory extended between Salisbury and Monroe.

what is called the Danville Division, and included Hurt, Virginia. I have been with the railroad since 1921. I started in the Engineering Department, was Junior Engineer—that is civil engineer—and in 1929 I was transferred to the Roadway Department and made Track Supervisor. I was Track Supervisor from 1929 until 1934 when I was made Trainmaster. I took Civil Engineering in college.

I went to Hurt, Virginia, about 8 o'clock on the morning of the accident with Mr. R. M. Bankhead. Mr. Drinkard was there when I got there. At that time Mr. Bankhead was Track Supervisor with jurisdiction over the tracks extending through Hurt, Virginia, and Mr. Drinkard was Section Foreman, his section including Hurt, Virginia. The derailed cars were there when I got there. There were four cars which had derailed, the leading truck on each car as it backed into the siding, had derailed. The truck on the car on the south end, that is the lead end, had derailed to the west. The leading truck on the second car from the rail as he backed in had derailed to the east. The leading truck on the third car had derailed to the west. The lead- [fol. 84] ing truck on the car next to the engine had derailed to the east. In company with Mr. Bankhead and Mr. Drinkard, I made an inspection of the roadbed, cross ties, derailer and rails on this storage track on which this derailment occurred at that time. I found the cross ties in good condition. I examined the rails and found them in good condition. There were slivers on the outside of that rail and on the outside of various other rails in that siding. On that morning Mr. Drinkard put the track gauge down at the point of the derailer and it showed the track was to a standard gauge, 4 feet 8½ inches. The weight of the rails on that siding, including the rail opposite the derailer, is 85 pounds to the yard. The overall height of a new 85-pound rail is 5 3/16 inches. I examined the height of the rail at Hurt some two or three weeks ago, and would say that rail is around 5 1/16 inches, indicating that there had not been over one-quarter of an inch wear in the ball of the rail.

In my opinion slivers accumulated on the outside of the rail, including this rail opposite the derailer, due to the fact that the wheel on the car is canted. The surface of the rail is slightly inclined with the smaller circumference on the outside than is on the inside of the wheel, the purpose of that being this, the wheels on the box car are fixed rigid

to the axle. When the car goes around the curve there is a natural tendency for the wheel to hug the outside of the curve. This gives you a smaller circumference running on the inside rail, which takes care of the difference in the distance around the curve, which of course is shortened by the difference of the radius of the curve to the extent of the gauge of the track. Now, this canted wheel, which is canted for the purpose I have just said, has a tendency to roll the rail away from it. The metal tends to flow from the gauge side of the rail to the outer edge. The gauge side of the rail is the inside between the rails. There is a natural tendency for a slight flow from the gauge [fol. 85] side outward. This might be likened to a hone in a razor. You get a wire edge there. It pushes it out. There is not any friction, pressure or other force supplied that I know of which would have a tendency to push any of the rail to the inside of the rail. I have never heard of it or seen it. When I examined these rails up there, including the inside of the rail opposite the derailer, I did not see any slivers on the inside of any of these rails. I have never seen any slivers accumulate on the inside of the rail of a railroad track which is being used by running engines and cars over it, because the flange has a natural tendency to cut them off in case there should be any.

There was absolutely no change or repairs made of the track in any way from the time the cars were picked up after the accident occurred until it was put in use, and none have been made since that time to my knowledge.

The variation in the gauge of the track from a quarter of an inch to a half of an inch would have no tendency to cause any unsafe condition.

The Court: The witness is submitted by the defendant to the Court to be found as an expert to give testimony with respect to engineering on roadbeds and tracks, rolling stock or standard gauge railway, and the Court finds from his qualifications that he is an expert and so holds and admits his testimony as such, if offered as such.

(Witness resumes): I examined the derailer up there on that day. I went back up about March, 1942, and examined it again. I have looked at this derailer (indicating the derailer exhibited in Court by the defendant). It is the same derailer exactly as the derailer up there at Hurt. Its construction looks to me to be the same, and it has

marks on it that also indicate that it is the same. That is a Hayes Model C, size 5. I would say that the Hayes derailer is a standard derailer used by the Southern Railway System and lines connected with the Southern Railway Company that I have had the opportunity of seeing. I have seen Hayes derailers on the Coast Line, on the Seaboard Air Line, on the Norfolk & Western Railroad, and on the C. & O. The Hayes Derailing Company manufactures the derailers. The individual railroad companies do not make them.

When I was up there on March 19th, Mr. Drinkard, Mr. Bankhead and I made measurements of the width of the top of the ball of the rail opposite the derailer. It was slightly over $2\frac{1}{2}$ inches, which is more than standard width of a new 85-pound rail; that increase in the width of the head or ball of the rail was due to the flow of the metal to the outside of the rail.

I examined the derailer at Hurt, Virginia, on my arrival immediately after this accident, after I got there, which was approximately an hour and a half after the accident occurred, and I found fresh wheel marks on the derailer. I saw wheel marks extending over the top and some indicating a slippage down the side. There were any number of wheel marks. I mean by that, fresh wheel marks.

(Examining "D-2") I think that is a fair and accurate picture of that derailer at Hurt, Virginia. That is a one-way derailer. If cars were traveling north on the storage track they would strike the derailing end. It is located so that cars backing in to the storage track would strike what has been referred to here as the wrong end; in other words, it is not the derailing end or the end built for derailing. I have not seen a flange, groove or other depression in the wrong end of a derailer which is built for the purpose of suitability for the wheels hitting the wrong end of the derailer to ride over any such flange in order to let it run back on the rail. Hayes Derailer #5 that we are talking about certainly does not have any such groove or arrangement.

[fol. 87] Q. From your examination of the track out there and particularly the rail opposite the derailer and the condition of that rail, do you have an opinion satisfactory to yourself as to whether or not the condition of that rail in any way contributed to that derailment?

Mr. Frazier: The same objection. It is a conclusion.

The Court: Objection overruled. Exception. I will let that go in view of the fact he testified that he was up there the next morning about 8 o'clock, or about an hour and a half after the alleged accident took place.

(Witness resumes): I have an opinion about it. I have a very definite opinion that that rail did not contribute to the accident. I have a very definite opinion that that rail is entirely satisfactory. That rail is safe. I saw slivers on the outside of the rail somewhat similar to this (indicating "P.2"). I don't think that slivers on a rail of this size would affect the safety or soundness of the rail.

When I was at Hurt, Virginia, about March 19, 1942, I made an observation of the rail opposite the derailler so as to observe whether or not any slivers had been picked off. I found two places on the rail where slivers had been broken off from the outside which approximately were the length of these two which I have here in my hand. I am speaking now with reference to the outside of the rail opposite the derailler. I found no slivers on any of the inside of the rails.

Cross-examination.

I made that examination with reference to the inside of the rail in March of this year, three or four years since the derailment. We examined the rail at Hurt after the accident occurred and found it to be sound and satisfactory. My purpose in examining the rail was to determine whether or not it was sound. Right after the derailment I did not [fol. 88] examine it to see if I could find any slivers on the inside of the rail. I did not examine it for slivers because slivers were not important as to the safety of the rail. I don't think you find any slivers on the inside of the rail. I don't think that slivers on the inside of the rail makes any difference, I don't think they would affect the safety of the rail at all.

When a train goes over a derailler raising one side of the box car, the weight is thrown to the other side and that will make the flange of the wheel on that side hug the rail and fit tighter than it would ordinarily fit. We put sand on the track to keep the wheels from skidding. Any rough substance on the track will keep it from sliding along and hitting smooth. If the rail was rough on the inside and the

wheel was binding close to the inside, there would be less tendency to slip than there would otherwise. More tendency to climb, absolutely. When your car was tilted towards the west rail there would be some tendency to climb if the west rail were curved. The weight would be pressed towards the west rail and if the west rail were straight, which it was in this case, the tendency to climb would be negligible. There is no tendency to climb on straight. There might be a slight tendency. The tendency to climb the outside rail, due to a curve, might be increased by raising up the wheel on the inside but on a straight track any tendency to climb there by raising up the outside would be negligible. The reason it does that way on a curve is because the curve is taking the moving change out of the straight path. The whole thing is pressure if it is on a curve. I don't think you would get pressure if you just raised the wheel on the other side and made the car tilt towards the track on that straight side. From the principle of pressure and the movement of the change, either one way or the other, I cannot see how raising up an empty car the height of the derailer on one side would have any more tendency or rather I cannot say that the tendency to [fol. 89] throw it to that side would be of any considerable amount.

Backing over the derailer would have a lot of effect. The reason is, when the truck backing down there hits that edge of the rail that is not supposed to be there, that truck jumps and you cannot tell which way it is going. It depends on whether the flange is on the west.

We take rails off of curves and put them on pass tracks. They generally straighten themselves out fairly well when you pull the spikes out. It has a tendency to straighten out. I never did straighten one. I know I never straightened one. They always straighten themselves. We use rails out of a curve to put in sidetracks, and we use rails that have flowed to put in a track. We take them out of the main lines and put them in sidings and take them and put them in other main tracks. We take the worst ones and put where they will have the least punishment. This was my territory and I was responsible for this section then. I was responsible for the engines and crews. This is my section and covered by my responsibility.

Redirect examination.

Mr. Bankhead was responsible for the track rails. I was responsible for the engine and crew.

(Illustrating) The operating stand that operates this derailer will be here. The rod going from the stand, which would be right here (indicating) would go under there and back to the derailer on the bottom. In throwing that derailer off, the rod would work this way, connected to the bottom and would pick it up and slide it back. This one seems to be rusty and stiff with grease. That is what is known as non-derailing position. After you finish work the party operating the derailer, the brakeman, or whoever it may be, throws the stand back and that pulls this rod back like this (indicating), which is of course as I said, connected back there, and that brings this derail up through the slots to the point where the rail is and it drops of its [fol. 90] own weight on the rail, resting on the rail by its own weight. It operates very much like a switch stand. The movable part weighs about 50 pounds I believe.

Re-cross examination.

I am familiar with the rule book that the Southern uses. That is a rule book but I don't believe it is up to date. Those pictures on page 77 of the Rule Book represent the type of signal that may be used where the occasion or the conditions may warrant it. They had a target on this derailer at Hurt, Virginia, in form and type as is shown on page 77, without the light. That picture represents a target with a light. That is a fair representation of the one at Hurt, except it did not have a light on it. Those large pictures in between are just increased views of the type of light that go on these two right here (indicating). This picture of a lantern. Over on the other side, at the top of page 78, is the same thing showing them turned the other way, set in a derailing position. That shows derailing. The dark color is set for derailing.

Pictures in the Rule Book at the bottom of page 77 identified as "P-3" and at the top of page 78 as "P-4".

Redirect examination.

The track over at Hurt, Virginia, on which the derailment occurred is an automatic block system. It is not cus-

tomary to use lights on derailleurs on storage lines in automatic block systems. The derailer with the equipment on the target is not standard equipment. When you ask for a derail you specify whether or not you want a target and if you want a light for it you have to request the light. If you do not make a special request for a light it is not customary to furnish lights on derails except on occasions or at points where it is felt that it is necessary for the use, other than in automatic block systems. The purpose of showing a target on there, frankly in my opinion, has never been justified. My reason for that is that rules require [fol. 91] that the man operating the switch or derail see that the derail is off or that the switch is properly set regardless of the indication of the target. That practice of closing the derail before the switching operations are completed is unnecessary and is, just as occurred in this case, liable to cause trouble and should not be done.

R. M. Bankhead testified: I am Track Supervisor of the Southern Railway Company, including the trackage at Hurt, Virginia, and I occupied that position on December 25, 1938. I was promoted to that position the latter part of 1935. I have been with the railroad 23 years. I started as an ordinary hand and worked up to what we call Section Foreman, and was promoted from Section Foreman to the job I am now holding.

The Court: From the examination the Court holds that witness is an expert and permitted to testify with respect to tracks of the railway.

Mr. Drinkard was under me. In the performance of my duties as Track Supervisor, I had occasion during 1938, prior to December 25th of that year, to examine this pass or storage track. I would get out and look at it. I went there on the morning of the accident about an hour and forty minutes after it occurred, with Mr. Carter. Mr. Drinkard was there. When we got there we found four cars derailed. What I call the leading car was derailed, the front trucks of it derailed to the west, moving south. That was the leading trucks to the first car. That is over towards the main line. No other trucks of that car were derailed. The leading truck of the second car was derailed towards the east, which is opposite the main line against the bank. The third was derailed as the first, the truck was derailed towards the main line, which is west. The leading wheels on the fourth car were derailed to the east, just like

the second car. The front trucks of the fourth car were just at the derailer, ran off right at it and that is where they [fol. 92] were when I saw it.

When I got there that morning I made an examination of the track and the rails. That included all rails involved in the derailment, including the rail opposite the derailer. I made a thorough examination of it, both sides of it. There were no slivers on the inside of that rail. I never have found any slivers on that rail previous to that on any rail anywhere, including this siding. I have an opinion satisfactory to myself as to why I have never found slivers on the inside of any rail. Simply because the flange of the wheel will cut them off, wear them off.

The standard height of a new 85-pound rail is around 5-3/16 have a track gauge. That gauge was applied to the track between the rails right at the derailer that morning. It indicated perfect gauge, 4 feet 8 1/2 inches. I examined the derailer. I would consider it steady. There is no way that I know of that any movable part of the derailer can be suspended in the air so as to be moving around. In my opinion the weight of the portion of the derailer that rests on the rail is approximately 60 pounds.

I did not find any damage done to the rails, crossties, roadbed or the derailer at the derailment. I did not make any suggestion, change or alteration in the track, crossties, roadbed or the derailer. I have not made any since that time, and none have been made from then until now. I was present when Mr. Drinkard put the track gauge on the track, including the portion right at the derailer on or about March 19, 1942. It indicated it was perfect gauge. The standard height of a new 85-pound rail is around 5-3/16 inches, I think. From my observation of the rail opposite the derailer I would say the height of that rail was around 5-1/16 inches. It would not be over one-fourth of an inch gone off, no way, shape or form. In my opinion variation of one-fourth to one-half of an inch in the gauge of a track would not have any effect as to cause damage and make [fol. 93] wheels leave the track or cause the track to be unsafe, because one-fourth or one-half of an inch would not have any effect on a wheel leaving a rail. There is no flange or groove on the wrong end of a derailer to serve the purpose of conveying the wheel over the derail on to the rail after it passed over the derailer. When I got there on

the morning of the accident the derailer was on the rail. It was in derailing position.

Cross-examination:

The derailer works at all times. Half of the wheels went off—the front trucks jumped and the back did not. My explanation as to why one-half jumped one way and the other half jumped another way would be the speed or how fast he was going. A train going three miles an hour could be stopped at once. This train went three car lengths without stopping, simply because it was not signaled to be stopped. I don't know whether the engineer was looking. He was looking but could not see him off of that turn-out. I do not mean that there was a turn-out here so that the engineer, four cars back, could not see Mr. Brady. The derail was on a straight line. I mean he came out of a curve on a straight line. That would not have had any effect if the engineer had been looking south, the way the train was going. I was just speaking that he came in from a curve.

In the course of a long time a rail wears out. I never saw any worn out completely. I have seen some not fit for use, broken up. Unless they are broken up they are good as long as they are safe for operation. I have got to see a whole lot of flow to satisfy me that one is not sufficient for operation. It has to be an awfully bad rail for me to condemn it. I have never seen one when the ball of the rail was worn down to one-fourth of an inch thick. I would not let one stay on a track that thin. Whether I would let one stay on a track if the ball of the rail was only one-half of an inch thick would depend altogether on which side of the ball you are speaking of. I mean one side and the one [fol. 94] to run opposite your wheel. As a rule we always run them as we took them out of the track. We don't care which side we put back, as the rail was when we moved it, we put it back. In other words, if it is worn pretty badly on the inside, we just put it back like that. We don't change it and put the best side on the inside where there would be the most wear. The inside is what wears. The top of a rail when it is new is not flat, and that is made so that the flange of the wheel, the inside of the wheel, is rounded like the curve of my finger, and the purpose is that the round flange of the wheel will hug or move along on

the smooth, rounded surface of the ball of the rail, so that there will be no friction in that smooth space between the flange of the wheel and the ball of the rail.

Rails get rusty when not in use. That track is in good shape. I would not say it is the best I have got but it is in good shape—just about the average for storage tracks. That storage track was not put there for safety. We have good heavy rails there too. That is a fair rail and nothing with pieces as big as that come off. That is ordinary small things that drop off every time the train passes over. If they are on the inside the flange of the wheel would cut it off. If pieces like that are cut off the inside, it would leave a gap in the rail and that would mean where it was cut off there would be rough gap spaces left in the rail; that would be on the inside or outside, from wherever they came off.

Redirect examination:

From my examination of the inside of the rail on various occasions, including the rail opposite the derailer, I did not see any gaps on the inside of the rail. It was smooth. That track is used every day by 4800 class freight engines. They are large ones. I have seen men back the whole train in there. If it was completely loaded there would be around 60 or 65 cars.

[fol. 95] H. G. ROGERS testified: I am Chief Timekeeper with the Southern Railway Company, and I held that position in 1938. I have a record of the earnings of E. A. Brady for the year 1938. We have permanent records. I prepared this statement from the records kept by me in the regular course of business as Chief Timekeeper. Payments were made to him as follows: January, 1938, \$6.18; February, nothing; March, nothing; April, nothing; May, nothing; June, \$8.46; July, nothing; August, \$75.11; September, nothing; October, \$40.60; November, \$43.12; December, \$132.42; a total for the year of 1938 of \$305.89.

Cross-examination:

Really I don't remember whether 1938 was a good railroad year for labor; whether we had to lay off a lot of men. According to the payroll records it was not a very good year for Mr. Brady. Those months with nothing on there show

that he was not called and did not work for the railroad. As far as I knew, except for the time book, I thought he was working regularly. I don't have his daily time where I can get it. We have our daily records and, of course, it shows only the days, amount of seniority and the rate of pay. And, incidentally, this time keeping system at this time is kept by machines and it is all coded. It is something like a tabulating machine. Anyone can understand the charts. This \$305.89 represents only a very short time of work, and in December when he worked a good part of his time he got \$132. That was the month he was killed, on the 25th of the month, and if he had worked regularly, making all the time that is possible, he would make over two hundred dollars a month for regular time.

M. I. SCRUGGS testified: I work for the Southern Railway Company as engineer on the local freight between Greensboro and Monroe, Virginia. I pass this track involved here practically every day. We go out one day and back the next. I have been on the local ever since that track has been put in. We use the track nearly every day going north. [fol. 96] We don't coming south, but going north, practically every day we use it. From 1936, when it was put in, up until December 25, 1938, we used it three or four days a week and sometimes oftener, depending on what we have in the car. I would be driving a 4800 class engine. That is a heavy Mikado, 350,000-pound freight engine. The number of cars put in would vary as the occasion required.

I have run freight engines in that pass or storage track about three or four days a week since December 25, 1938, up until now, and I am still on that run. I never had any trouble going in and out of there as far as the track is concerned.

Cross-examination:

I never backed over the derailler when it was closed. In the crew we had three: brakeman, conductor, fireman and myself. I have very often had to back into this pass track whenever the trains are coming on the main line to get by. We have a flagman, swing man, and the head brakeman. The head brakeman generally stays where I can see him up around the front of the engine. The swing man stays back towards the rear where he can see the man on the rear, the

conductor or flagman. He does the flagging. When I am backing into this pass track it would depend on the length of the train as to who would open the switch and the derailer for me to go in. Sometimes the flagman has to be out flagging; sometimes the swing man does it, sometimes the conductor does it, and if it is where I can see them, sometimes the head brakeman. He is up at the front all of the time where I can see him. When I come out of the pass track the caboose is the last thing that comes out, and when the caboose is clear of the switch someone has to throw that switch, and it is the conductor or flagman or swing man that does it, then the train comes on down the track and backs out if it wants to, or goes on north, whichever way I am ordered to go. In a shifting operation it is not customary [fol. 97] to close that derail until the operation is all over.

Q. So when the front brakeman went out of the engine, or the four cars in this case, it would leave the fireman and flagman at the back end of the train up there to close the switch and fix the derailer?

A. Not the fireman.

Q. I mean the conductor?

A. Yes, they are at the rear.

Q. I ask you if you don't know the rules of Interstate Commerce require that you have three brakemen, that is a flagman, a swing man and a head brakeman?

A. I don't know about that.

Q. You know that is generally the crew?

A. Some of the locals don't have but two.

Q. But on this you had how many?

A. Three. We had a lot of switching.

I don't have anything to do with the maintenance of the track. As an engineer I depend on the Maintenance Department, the section hands and the other employees, to see that those tracks are kept in proper condition. I have nothing to do with the ballast or anything of that kind. There was no light at this switch. I don't have any trouble seeing a man on the car, on the east side of the car moving south from my engine, up as far as four cars when the car is first starting to switch, but if he gets around the curve he might get out of sight because of the tender. The engine would be about on the switch when the head car goes on the derailer

and that would throw him out of my sight. He might get around the curve so the engineer could not see him.

Q. You ought to know—I am asking you whether or not when you are at the switch, looking and moving south, whether or not you can see a man on the lead car on the southeast corner, especially a gondola or hopper car?

A. It depends on how much coal is on the tender.

[fol. 98] Q. I am not asking you about any coal on the tender—I will ask you, hanging on the stirrup on the southeast corner when you are over the switch, when the engine is at the switch here (indicating), a man on the stirrup of the lead gondola car which is only four cars south of you?

A. I could not tell you right now whether I could see him around that curve.

Q. You have never looked to test that out?

A. No, sir.

Q. You do know that there is nothing there except that possible curve that would prevent seeing a man on the gondola?

A. That is all.

Q. And you did not go there afterwards to see about that after this wreck occurred?

A. No, sir.

I don't know anything about the condition of the rails or the condition of the derailer. All I know is in my continuous operation I have been in this track a good many times before and since and have not had any trouble.

Redirect examination:

When you back into a siding with four cars ahead of you on a dark night or early in the morning when it is still dark and misty and the brakeman is on the lead end of the front car, he is supposed to have a lantern. As to the signals, you go by his lantern. He gives the signal with his lantern. You do not see him if it is dark. You might *could* see his lantern around that curve. I run a local freight. I was telling Mr. Frazier how many members there were on a local freight: one conductor, two brakemen, one flagman, one engineer and one fireman. That is six. On a through train you have one brakeman, flagman and conductor, fireman and myself. There would be five men on a through freight and six men on a local freight.

A. L. DORSETT testified: I work for the Railroad. I was on this train with Mr. Brady on the morning of December [fol. 99] 25, 1938. I am fireman. Besides me there were Engineer Woodson, Conductor Brandt, Flagman Scruggs and Brady was braking on the front end. He was the only brakeman. At the time of the derailment the engineer was in the engine. I was firing; sitting up there looking out. The conductor, Mr. Brandt, was about 400 yards checking up those twelve cars of loaded coal that we were picking up; 400 yards south of the derailer. Mr. Scruggs, the flagman, was somewhere at the rear flagging; he was on the rear, somewhere to the south, about four or five hundred yards from the derailment. At the time this cut of four cars backed into this siding there was no other member of the crew at or around the derailer other than Mr. Brady.

We were in there for No. 30 and when it passed we pulled up the main line and backed up south of the main line there and we cut off four cars. Mr. Brady, the brakeman, cut them off. After he cut them off he came on down and threw the derailer. The brakeman, Mr. Brady, closed it, and then threw the switch and waved us back. I was sitting there looking around, I seen the cars were derailing, jumping off of the track. I got a torch and lit it and got out. In consequence of what I told the engineer, he stopped as quick as he could, right now you might say.

Cross examination.

I was on the west side or the left-hand side of the engine as it moved north. There were 37 cars in the train when we got to Hurt. We went north beyond the station. At that time I think Mr. Brady was up on the engine with us. Someone at the rear of the train had to turn the switch for it to back in and had to change the derailer, if it was closed. It would be closed because there were twelve cars in the pass track. In the first operation the train backed in and backed down and the engine passed south of the derailer, and then Mr. Brady, soon after No. 30 had passed, got out, opened the derailer and opened the switch and the train came on out. When the train cleared the switch and was [fol. 100] back up the main line beyond the cross, Mr. Brady was on the cut of four cars. The engine cleared this crossing and while the train was in that shape the four cars were cut off and the train came on down the main line and

came on back up to the switch and then Mr. Brady got off to throw the switch. When he got off to throw the switch that put him around on the east side of the cut of four cars and put them between me and Mr. Brady. He must have thrown the switch. No, sir, I didn't see him. He threw it and waved us back. When the cars began to turn and go on up the track I did not see Mr. Brady when he was hanging on the stirrup of the lead car of those four cars. I did not see him any more until after his death.

The switch was on the opposite side from me. The conductor was up there checking. He came from up that way, I don't know how far. I last saw him when we backed out from No. 30. I never saw him any more until after we backed out of that switch. Mr. Scruggs was up flagging. He was up that way. Well, he come from up that way. The last time I saw him he was flagging up at the rear where we were going to pick up those twelve cars. He came up from that way after the accident happened. I seen him come from up that way. He came right up to the accident. I never saw him until he got in about ten feet because it was night. The conductor and the flagman were up that way.

The Court: Did you see someone walking from that direction carrying a lantern to where the man was killed?

A. Yes, sir.

I was just a little distance from this when I first saw the lantern, just a few feet. The derailer was on the opposite side. Mr. Brady turned us out from No. 30, on the main line for No. 30. You see, that was on the opposite side. All of the signals are on that side. I seen the cars jumping the derailer. Mr. Brady was on the opposite side from me. Being on the opposite side I did not actually [fol. 101] see him. The switch and derailer were handled on the other side from me. I mean by that that I did not see him do it. On this occasion I did not see him close the derail and I did not see him throw the switch either. It was on the opposite side.

Redirect examination.

After the engineer stopped the engine we got down on my side. I went back to where the derailment was, along by the side of the track, back to where Mr. Brady was. The conductor, Mr. Brandt, and the flagman, Mr. Scruggs, were

not there when I got there. I saw them coming towards me from the south after that. I saw their lanterns as they came towards me, some distance up there. They come up—me and the engineer were talking—when I first saw them they were something like I imagine the distance to the back of the room there.

E. C. SCRUGGS testified: I was flagman on this train crew at the time of this derailment. I was about a half mile south of the switch. I heard the alarm whistle blown. I did not come on up to the switch, I stayed back up to protect the rear of the train. About forty or fifty minutes later the engineer called me in and I heard about Mr. Brady being killed. He was killed at the derailer. At the time he was killed I was something like a half mile south of the derailer. From the time I got to Hurt until after Mr. Brady's death, I did not touch either the switch or the derailer.

Cross-examination.

When the train pulled out of the pass track I was 37 car-lengths from the engine on the back of the caboose until No. 30 run. I got off the train while it was in the pass track. I was down at the end of the train, the 37th car. That was way down below the crossing. I got off of the cab as soon as No. 30 ran and went back to flag, before it started out of the pass track—to flag anything that might be coming. There is a switch down below this pass track [fol. 102] that connects with the main line. I did not go beyond that south switch. I was down there and don't know anything about what was done when the train came out of the pass track. The first thing I knew was when the whistle blew and I came up forty or fifty minutes later. I did not come up with the conductor and meet the fireman up there right after the death.

Redirect examination.

Mr. Brandt rode the rear end of the train when it backed up the main line. I was getting the brakes off of the cars and he was checking the cars by the bill when the whistle blowed. He was something about fifty car-lengths south of the derailer I will say when the whistle blew. On the

train crew besides me there were Conductor Brandt, Mr. Brady and the engineer, Mr. Woodson, and the fireman, Mr. Dorsett.

Recross examination.

The conductor was down about the derailler when we backed into the pass track. He never rode the cab back. He came back and watched the crossing. When the train came out and when Mr. Brady went on up with the four cars, I do not know who turned the switch so that the train could come back on the main line. The last car that would have gone over that derail before the four cars were pushed in was the caboose. Sometimes the conductor is there and sometimes he is not. Sometimes he cannot be there. The caboose is not the conductor's place every time; he rides anywhere on the train he wants to. The caboose is for men to ride in between stations and to their work on. That is the place where the conductor works and makes his reports and is his headquarters.

I got off of the caboose car as soon as No. 30 run and went back south to the cars that we were going to pick up. At that time I was in the caboose car away south of the crossing. I don't know anything about the operations in getting out or in getting back in that cut of four cars. I got off when they first stopped at Hurt. They turned out [fol. 103] and backed in and I got on the cab and changed my marks from red to yellow and stayed on the cab until I changed my marks back from yellow to red and got off and went back to the twelve cars we were going to pick up that were back on the south end of the pass track.

Defendant rests.

PLAINTIFF IN REBUTTAL

MRS. IRENE BRADY (recalled) testified for plaintiff, as hereinbefore set out.

Plaintiff offers in evidence the pictures in the Rule Book at the bottom of page 77, marked "P-3", and at the top of page 78, marked "P-4", with permission to withdraw the Rule Book at the termination of the trial. These exhibits not being susceptible of reproduction or copying in the printed record, it is agreed that counsel may exhibit same

to the Court at such time and in such manner as it will permit.

Evidence closed.

At the close of all the evidence the defendant renewed its motion for judgment as of nonsuit. Motion denied, and defendant excepts.

Exception No. 14.

In apt time the defendant tendered the following issues and excepted to the refusal of the Court to submit them to the jury:

Exception No. 15.

ISSUES TENDERED BY DEFENDANT

1. Was the death of plaintiff's intestate caused by the negligence of the defendant, as alleged in the complaint?

Answer:

2. Did plaintiff's intestate assume the risk of his death, as alleged in the answer?

Answer:

[fol. 104] 3. Did plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer?

Answer:

4. What damage, if any, is plaintiff entitled to recover?

Answer:

The Court submitted issues as set out in the judgment appearing in the record, and defendant excepts.

Exception No. 16.

The Court: I don't believe under the evidence now elicited, and I think you are doing the only fair thing that could be done in letting it come out, that any recovery, if any should be had, would in anywise inure to Gordon's benefit or that there should be an issue in his favor, but for the widow and children either collectively or separately.

Mr. Frazier: Because of his not being here, I have no disposition to deprive him of anything in the suit, but feel that I should leave it to you to determine whether or not in the event of a recovery he was entitled to recover anything.

The Court: The Court refused to submit an issue as to damages, if any, of one Gordon Brady, who it appears from

the complaint filed in the action is a son of the deceased by a former marriage and who, the evidence shows; at the time of the death of the deceased had passed his 18th birthday but had not reached his 19th birthday, was living separate and apart from his father and living with his mother, the former wife of the deceased by his first marriage, who had been receiving no contributions in the way of upkeep or maintenance from the deceased, and who at most had been given only occasional small sums of money.

Neither party to the controversy asks an issue as to Gorf. [fol. 105] don Brady, but since he is set out in the complaint as being a dependent of the deceased and certain evidence occurred, and since he is a party so to speak to the action at bar, the Court feels it wise and proper to make this entry into the record and to exclude him from any further right as against the defendant, the Railway Company.

JUDGE'S CHARGE

Gentlemen of the jury, we are coming now to the end of the case for which you gentlemen were selected, as I recall on last Wednesday, and the action as you already know is one that appears on the Civil Issue Docket of the Superior Court of Guilford County, entitled "Irene Brady, the Administratrix of the Estate of Earle A. Brady, deceased, v. Southern Railway Company," being an action instituted by the plaintiff as the surviving representative of the deceased, Earle A. Brady, against the Southern Railway Company as a defendant, to recover damage for the alleged negligence of the defendant, the Railway Company.

The plaintiff in her complaint which is filed in this case makes certain allegations against the defendant which I will in just a moment recite partially to you gentlemen, and the defendant Railway Company, as I will presently recite to you, makes certain answers to those allegations.

Among other things, gentlemen of the jury, the plaintiff Mrs. Brady alleges that her husband was killed and lost his life while acting as an employee on one of the trains of the Southern Railway Company; she alleges that she thereafter was appointed as his representative by the Clerk of the Superior Court of Guilford County, in which county she alleges she and her husband and the children were resident in prior to and at the time of the death of the deceased, Mr. Brady.

She alleges, among other things, that the Southern Railway Company is engaged in the business of operating a [fol. 106] a line of railway between points in and out of North Carolina and is an interstate carrier of freight and passengers, incorporated under the laws of the State of Virginia, and that it has lines of railway in North Carolina, South Carolina, Georgia and Virginia, the District of Columbia and other places through which its track of railway is located.

She alleges that on the 25th day of December, 1938, that her husband, who had for some time been an employee of the Railway Company as a brakeman and was at that time serving as what is called an extra brakeman, was called to act as such and in that capacity on a train out of Spencer into Monroe, Virginia, and at and on that run and at or about the hour of 6:30 o'clock on the morning of December 25, 1938, he lost his life while engaged in work as an employee of the Southern Railway Company.

She alleges too, among other things, that the Railway Company at Hurt, Virginia, had a siding on which there had been bolted or attached a derailer, and that just opposite the derailer that there had been placed in the siding a defective rail or a series of defective rails, outworn and outmoded and of such physical type and character as to be defective in the sense that they had not been inspected and kept in a reasonably safe condition; that just prior to the time of his death that the derailer had been set, with the idea that if any cars were left on the siding, in the event they should be loosened or unmoored they would not roll on to the main line and cause a wreck, and that this derailer had been set, and that her husband while engaged in the act of brakeman in backing into the siding four certain cars then attached to the engine was riding the front car from the engine and that as it went into the siding and over the derailer, that the derailer having been set caused the car and the wheels on which it was located to jump the track, and that while it was suspended in that position that the [fol. 107] defective rail just opposite or across the derailer, together with the derailer being set in a defective way and manner, proximately brought about and produced the death of her husband. She alleges, among other things, that that was negligence, and that that negligence proximately brought about his death.

She alleges too, among other things, that the Southern Railway Company was engaged in interstate commerce and subject and amenable to and under a state of facts within the meaning of the Federal Employers' Liability Act; that her husband at and prior to the time of his death had been making \$194 per month; that he left him surviving the widow, this plaintiff, the administratrix appointed by the Clerk, and three children, two of them children born to her as his wife and another child born by a former marriage and at the time of the death of Mr. Brady, of the age of approximately eighteen years, and alleges that she, as representative of his estate and the beneficiary under the law which I have recited in part to you; the Federal Employers' Liability Act, has been damaged in the sum of \$50,000, and files her complaint asking, under the facts set out herein, that such amount be awarded in the disposition of this particular case.

The Railway Company, as the law would require in North Carolina, in due time files its answer, which is the answer it sets up in response to the complaint made against it by the action brought by Mrs. Brady as administratrix of Mr. Brady, deceased, and makes certain admissions of the allegations and certain denials, and sets up and pleads the doctrine of assumption of risk and contributory negligence, alleging, among other things, that Mr. Brady was during his lifetime and for fifteen years had been an irregular employee of the Southern Railway Company; that during that period of time he had been subject to call, was occupying the status with the Railway Company of an extra brakeman; that he was experienced in his line of work [fol. 108] and was skilled as an employee, and that on the 25th of December, 1938, he was called to duty and that he responded and accepted the brakemanship for the run then about to be made between Spencer, N. C., and Monroe, in Virginia.

It admits among other things that he was killed, and sets out that in his death he assumed the risk incident to the employment as a brakeman, under the Federal Employers' Liability Act, and that in addition thereto his death was brought about and proximately produced by his contributing to his own injury and death, and sets up the plea of contributory negligence as well as the plea of assumption of risk under the Federal Employers' Liability Act.

It denies he was making the sum of \$194, and alleges that his services with the Railway Company, though satisfactory in the sense that he delivered honest work, that it was irregular and that his earning capacity was not of that amount.

These, gentlemen, are certain of the allegations in the pleadings as they are called in law on which the action is bottomed and under which allegations evidence has been heard by you gentlemen as tryers of the facts.

You will notice that the action is brought under the Federal Employers' Liability Act, and I instruct you that under the law applicable to the operation of trains in interstate commerce, that is to say, lines of railway on which trains are operated which go from one State to another, that the Federal law is all-controlling, all-inclusive, so far as the constituted statutes of our law are concerned with respect to interstate commerce, and the Congress of the United States has indicated what the law is under the Federal Employers' Liability Act. Congress, among other provisions, gave the right for actions under that law to be instituted in either the State or the Federal Courts of America, depending entirely upon that institution as to the status of the case on the question or theory of the residence or [fol. 109] citizenship of the individual who is alleged in the proceeding to have been injured or killed.

So in substance, gentlemen of the jury, you are passing upon the rights of the plaintiff as administratrix appointed by the Superior Court, that is, the probate section of the Superior Court, the Clerk of the Superior Court of Guilford County in North Carolina, under a cause of action brought under a Federal law in a State court, which creates somewhat an anomaly in the sense of overlapping jurisdiction or theory, or practice. However, there is nothing unusual or new about that particular step in the administration of the law, for it is the law that that is to be done and can be done and has often been done.

Of these allegations, gentlemen of the jury, and the pleadings of the parties, evidence has been heard by you gentlemen under oath as the law would prescribe for the hearing of evidence and its competency and its probative force from the witnesses who have testified and otherwise by deposition, and on the action styled as it is in the complaint and the answer made in the answer of the defendant and the evidence heard which is being submitted to you

gentlemen as final tryers of the facts, after the four or five days that we have been engaged in the hearing of the evidence and argument, together with the reading of the pleadings and the rulings of the Court, and now comes to you on these issues.

Your duty is to answer these issues which are in the form of questions submitted to you in such way as you find the truth to be, without regard to what effect your answers as you find the truth to be will have on the plaintiff on the one hand and the beneficiaries that come within the meaning and purview of the Federal Employers' Liability Act, or of the defendant on the other hand.

[fol. 110] These issues, gentlemen of the jury, are six in number and present in my opinion the matter clearly to you in the event you gentlemen can come to a common understanding as to what you believe the truth to be.

When you retire to make up your verdict there will be twelve of you to pass on this matter. Out of an abundance of precaution, in view of the facts that it appeared that the case might be prolonged, there was selected an alternate or thirteenth juror, which the law in North Carolina makes possible, through the wisdom of the General Assembly of our State but who, in the event none of you gentlemen become ill or otherwise become disabled, will be retired as the twelve of you who constitute the original panel and who, after being sworn were impaneled as such, will then accept these issues and make such answer thereto as you find from the evidence under the law the truth to be.

Three of these issues, gentlemen of the jury, are with respect to the matter of damage, the last three, numbers 4, 5, and 6. The first, second and third are with respect to the question of negligence, the assumption of risk and contributory negligence. There was not submitted a seventh issue which would embrace the question of damage, if any, to the child by the name of Gordon, who at the time of the death of deceased, it is alleged, was eighteen years of age, in view of the fact that from the evidence under the law of North Carolina, it was my studied opinion that he would not be able to have anything allotted to him as beneficiary in this particular cause, in view of the fact that his father, during his lifetime, not having made contributions to him, that he would not under the law and the facts be entitled to be a beneficiary if such should be found in the case and, therefore, there is no issue submitted as to him. The fourth,

fifth and sixth issues, gentlemen, are submitted separately and you will find upon examination that they relate to the amount, if any, for Mrs. Brady as the wife, and the amount, [fol. 111] if any, for the two children, the boy on one hand and the girl on the other. They are worded identically, with the exception of the names for which the damage is sought.

I will read those issues later in my charge to you, but I just mentioned them at this particular time so that these issues or questions would be fairly placed in your mind.

Among these questions or issues is question No. 1, and that reads as follows:

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint?

That means in substance, was Earle A. Brady, who the law would say was the intestate of the plaintiff, Mrs. Brady—named as administratrix,—was he killed by the negligence of the defendant, Southern Railway Company. That is the first question you gentlemen will meet when you retire to your room to make up your verdict, and that question will be answered by you in such way as you find from the evidence under the law the truth to be, and depending upon your answer to that question as you find the truth to be under the law will necessarily depend whether or not you answer any or all the remaining questions as you find the truth to be.

You see, the plaintiff, as the personal representative appointed by the Clerk of the Superior Court of Guilford and bringing this action as such, alleges that her husband was killed by the negligence of the Railway Company and that that negligence of the Railway Company was the proximate cause of his death. That is to say, her whole cause of action is bottomed on that particular theory, the alleged negligence on the part of the Southern Railway Company as made by her for the purpose of prosecuting this particular action.

Now, gentlemen of the jury, the law places on parties to controversies at the bar the question of going forward with [fol. 112] the evidence and assuming or having placed on that party what the law says is the burden of proof, for in every issue submitted to a jury there is placed by the law upon one or the other party to the controversy the question of the burden of proof, that is the laboring oar, and on that

first issue the burden of proof is on the plaintiff, Mrs. Brady, representing her deceased husband in this particular case for the alleged benefit of his beneficiaries, and that burden of proof is that she must satisfy you gentlemen as a jury from the evidence and by the greater weight of the evidence of the negligence of the Southern Railway Company, and that that negligence of the Southern Railway Company was what proximately brought about and produced the death of her husband.

Now, the Southern Railway Company is a corporation; that is alleged by the plaintiff and admitted by the defendant.

A corporation is permitted by law to be formed and is usually a charter given to a set of individuals to form themselves into a corporate body, and a corporation is dependent entirely upon the law. It can only act by employees, agents or servants, so when you speak of the negligence of the Southern Railway Company you are directly referring to the alleged negligence of the agents, servants or employees of the Southern Railway Company, because a corporation is a soulless institution, so to speak; it is a thing or vehicle by which living men are or living individuals can do this through the medium of a corporate charter, and must act, if it acts at all, through the medium of living individuals who are either agents, employees or servants. So Mrs. Brady in substance, among other things, charges that the Southern Railway Company was negligent and that its negligence proximately brought about the death of her husband through the negligence of the agents, servants or employees of the Southern Railway Company, some of whom were, as her husband was, engaged in operating that particular [fol. 113] freight train between Spencer, N. C., and Monroe, in Virginia.

Now, she has placed in her by the law the burden of satisfying you gentlemen by the greater weight of the evidence, first, that the Southern Railway Company was negligent, and, second, that that negligence of the Southern Railway Company was the proximate cause of the death of her husband.

So, the case being bottomed on negligence, I assume that there may come into your minds the question just now, what does the law recognize as negligence? Because after all that is the charge made by the plaintiff against the de-

fendant and that is the charge that is denied by the defendant in its answer to plaintiff's complaint.

Negligence, gentlemen, in law is a failure to exercise that care which a reasonably prudent person would exercise under the same or under similar circumstances. Negligence always arises from a breach of duty and where there is no duty there can necessarily of course be no negligence.

So, in order for you gentlemen to pass intelligently upon the question of whether or not the Southern Railway Company was guilty of or chargeable with negligence, it is necessary for you to understand what the defendant owed to the plaintiff's intestate, the deceased, Mr. Brady.

Now, on the first issue, "Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint?" I will repeat again, before answering that issue Yes, the plaintiff in this particular case must establish by the greater weight of the evidence that her husband, Earle A. Brady, her intestate, was killed, and that the defendant, Southern Railway Company, was negligent, and that that negligence of the Southern Railway Company was the proximate cause of his death, that is, the nearest or direct cause, or the cause without which his death would not have been suffered and sustained.

[fol. 114] Negligence in general is again defined to be the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do. I am using the word "man", gentlemen, but that has the same force and has the same similarity to a corporation in that particular instance.

Every negligent act does not in itself involve liability. The conduct of the party sought to be charged, that is the Southern Railway Company in this case, or its failure to exercise proper care, must amount to what is known in law as actionable negligence, and in order to establish actionable negligence the plaintiff is required to show by the greater weight of the evidence that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owes to the plaintiff under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances when charged with a like duty, and that

such negligent breach of duty was the proximate cause of the plaintiff's injury and death.

It matters not how negligent the defendant Railway Company may have been, if its negligence was not the proximate cause of the plaintiff's injury and death, there is no actionable negligence in the case.

The question then arises, what is proximate cause? Proximate cause, gentlemen, as defined, as the proximate cause of an event, must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces the event, and without which such event would not have occurred. It is the dominant, efficient cause, the cause without which the death of the intestate as charged in this case would not have occurred. [fol. 115] I purposely, gentlemen, have gone just a little fuller into the question of negligence and proximate cause in my explanation to you, in view of the fact that the case has taken some considerable number of days to hear, and to reach this point in its development, and in view of the fact that the case is one in which a death is alleged to have ensued and come about, and therefore, in order to as nearly as possible undertake as best I can to convey to you gentlemen the law, I have purposely gone just a little fuller into the explanation thus far than one customarily does.

Now, the plaintiff says and contends among other things that you should find from this evidence and by its greater weight that her husband was injured and killed almost instantly in Virginia through the negligence of the Railway Company, and that negligence was the thing that proximately brought about his death.

She says and contends that you should find from this evidence and by its greater weight that on this particular day, Christmas, that her husband was working; that he had been for the last fifteen years or more an extra brakeman subject to call when employment was available on the Southern Railway Company, and that he was a man who was determined to work and make something for himself and his children, and that when he was not on extra duty for the Railway Company that he engaged in following another occupation as a painter, and that if the Railway work and the amount of painting he was able to do—and she alleges further that you should find that he was proficient in both these particular occupations—that he left on this Christmas Day when ordinarily men would be disposed to stay at their

homes with their families or smaller children, and went out to work in view of the fact that he not only wanted to work, but needed the compensation work would bring. She alleges that the train progressed northwardly over the tracks of the Railway Company until it came to Hurt, Virginia. [fol. 116] She says and contends that the line of the railway was a double track, one leading northwardly and one leading southwardly; that on the right-hand of the northbound track at Hurt, Virginia, there had been in 1936 established what was called a storage or pass track with a switch from the main line at either end of the track and with the siding extending for something in the neighborhood of approximately a mile from one end to the other; that the train at the time was running about fifteen minutes late and that it became necessary, in order to let a main line train No. 30 cross over the track, for the train on which the intestate was employed to go into the siding, and the train on which he was employed went up to the north end of the switch and went back into the siding with the 37 cars and the engine; that as soon as Train No. 30 passed by, she says and contends that you should find from the evidence, that the whole of this train on which her husband was employed as a brakeman came out of the siding, went to the north of the switch and then backed past the siding, or past a portion of the siding until the engine had cleared a grade crossing somewhere between the north and south end of the siding and where the switches were located, and that there was cut away from the train four empty cars which were to be put off at Lynchburg.

She says and contends that her husband rode those four empty cars along with the engineer and fireman just past the original switch and then the four cars and the engine undertook to back into the switch.

She says and contends that when the original train as it approached Hurt, Virginia, and before No. 30 had passed, had come out of this siding after No. 30 had passed, that some agent or servant or employee of the Railway Company other than her husband had thrown the derailler so that any cars still remaining on the side track or passing track could not come down into the main line.

[fol. 117] She says and contends that that act and deed was contrary to the railway practice, that the derailler was never set until all the shifting operations had been gone

through with, and the train was in position to go into its destination over the main line.

She says and contends that from the evidence you should likewise find that the Railway Company previous to that time, either in the building of that side or storage track or in its maintenance, had caused to be placed into the lines of rail constituting the storage track a defective rail or rails of defective condition, saying you should find that the rail immediately opposite the derailer had been one made in 1912, and that it had been theretofore used for an appreciable number of years, somewhere in the neighborhood of 24 years or 26 years, as you might find from the evidence, in the main line, and when the Southern Railway Company and its officials who had its management in charge had seen fit to install and build this passing track, that they had designated instead of using new rails in the passing track, that rails used in the main line had been taken up and new rails installed in the main line and these old rails had been used in the passing track.

She says and contends that the rails had been in constant use, and had become defective, and that particularly on a rail that had been in a curve that the tendency brought about by constant usage and the friction that one force with another would produce, had had a tendency to wear around the top of the rail against which the trend of the wheel running over would have most of its pressure and create most of the friction in the wear and tear incident thereto, and these rails, and particularly the rail opposite the derailer was worn to the extent that it was defective, and when some agent, servant or employee engaged in the operation of this particular train on which her husband was extra brakeman, [fol. 118] had negligently or unconsciously or otherwise closed this derailer and when her husband had opened the switch so the train could go into the siding, that he was totally oblivious to the fact that the derailer was on; that he had not done that and knew nothing about it, and there was no light to indicate just what the signals might show to one if he had had an opportunity to look, but she says and contends that the Railway Company had failed to place a light by which her intestate could see whether the derailer was open or shut.

She says and contends, therefore, that you should find that the Railway Company was negligent in failing to place

on this switch a light so that it might be seen whether the derailer was on or off.

She says and contends that certain signs were printed on the flanges around the light at the derailer or switch, and that if a light had been placed there her husband could have seen that the derailer was on up there; that the Southern Railway Company was negligent, and that that negligence was the proximate cause or one of the proximate causes of her husband's death in not having installed on the post or installation a light which would have given her husband the information which he was lacking at the time he was signaling the engineer into the sidetrack and rode the head car from the engine to the siding.

She says and contends in addition thereto that the derailer was defective; that it was a derailer which had probably been used on other sidings or passing tracks and that it had been run over and utilized to the extent that it had a flange or curve which had been cut by other cars running over it in time and which had a tendency to cause it to be in a defective condition and not a fit object for suitable safety operation, and that in addition thereto the track or piece of track opposite the derailer was defective and in [fol. 119] bad condition, and taking into consideration all the circumstances that existed, that when the train backed on the derailer and the wheels were on the right-hand side looking south when up on the derailer that, thereupon, though the cars were empty, it caused an extra burden on the defective rail opposite the derailer, and that that circumstance and combination of circumstances had the force and effect of causing the wheels to jump the track, and that the force of that impact of the wheels jumping the track and suddenly being cast on the cross-ties, dislodged her husband from the place of safety he enjoyed, and caused him to be cast down on the railway track and to be run over and killed.

She alleges that the hour was about 6:30 in the morning, and that on Christmas Day that was still dark and that the train was being operated by the movement of lanterns as signals.

She, therefore, says and contends under the first issue and the evidence heard thereon that you should find from the evidence and by its greater weight, the burden being on the plaintiff, representative of Mr. Brady, deceased, that

the Railway Company was negligent, acting through its agents, servants and employees, among other things in the installation and maintenance of the railway track and in throwing the derailer which proximately produced in its entirety the death of her husband, and that you should so find from the evidence and by its greater weight, and should answer that first issue Yes.

Now, the Defendant, gentlemen of the jury, the Southern Railway Company, says and contends that you should answer the first issue No.

You see, the plaintiff says you should answer it yes and the defendant says you should answer it no. The burden is on the plaintiff. There is no burden on the first issue on the defendant.

[fol. 120]: The defendant among other things says and contends that Mr. Brady is dead, but that his death came about through a demonstration on his part of a bit of carelessness which, unfortunate as it was, did not as a matter of law involve the Railway Company in direct or collateral responsibility for his death.

It says and contends among other things that there was no necessity to have a light on the switch or arm which caused the portion of the rail to be either placed or derailed on the derailer; that the derailer was never set and the rules did not require that they be set, and that Mr. Brady was aware of that fact over a period of employment of about fifteen years, until all switching operations had been completed and then only was it set as a safety device to keep cars from leaving their moorings through the intercession on the part of others with their brakes, either from moving cars or from others who might go about the brakes and through idle curiosity release the catch and let the cars roll down. That in order to protect its main line and people on or about its track from any casualties or damages, that this derailer was placed on the siding or side track, particularly where there would be a slant towards the main line.

The defendant says and contends that the circumstances that resulted in Mr. Brady's death did not come about or happen as the plaintiff contends. The defendant says and contends that Mr. Brady's death came about through no fault of the Railway Company or any of its agents or employees, but purely and simply through his own carelessness and negligence and in view of the fact that he, under

the law, would assume for certain purposes, as I will presently explain, the operation as a railway employee and the dangers incident thereto in the normal course of operation. The Railway Company say and contends that the freight [fol. 121] train on which Mr. Brady was an employee or brakeman came up to Hurt, Virginia; that it was running at that time about 15 minutes late and that from the knowledge that the conductor and the operators of the train had, that it would be necessary for that train to clear the main line so that No. 30 would have clear passage going likewise north; that then it was that the train was carried by the engineer up past the north siding and the switch into the siding and that the conductor, as the caboose passed by, got off and opened the siding or the switch, permitting the train to go in from the main line into the siding, and went back the distance necessary, three or four car lengths, to open the derailer which had been previously set for derailing by the last crew which used this particular siding when the 12 loaded cars were placed in to be picked up by this particular train.

The defendant says that then the conductor of that train, as the caboose came by, got on to the caboose and rode on to the siding in the caboose to a point further south below the highway crossing, which the engine, the defendant says and contends, cleared. That the formula for the operation there was that this train was to pick up the 12 loaded coal cars which had been left on that siding by the Virginian Railway, which intersected with the Southern Railway Company, as the Virginian had brought the coal from the mines to be carried to Washington or points north, or Lynchburg, or such place as the destination of the 12 coal cars would have been, and that pursuant to the waybills, that the engineer and fireman on the engine, and Mr. Brady as the brakeman, cut loose these four empty cars which were to be carried to Lynchburg, the theory being they would go on back up after the whole train had been taken out of the siding and No. 30 had passed and the main line occupied by the train, that then the rest of the train would be left on the main line, and these four cars would back back into the siding and pick up the 12 loaded coal cars; [fol. 122] that then it was hoped that all these 16 cars when coupled together by Mr. Brady, together with the engine, would then go out of the siding; that then the derailer would be placed in operation and the switch would be

thrown so the train could be backed back on the main line and pick up the cars left there, including the caboose, and the journey resumed.

The defendant says and contends that you should find from this evidence, the burden being on the plaintiff, that when the conductor was on the caboose after having opened the derailer and the switch to let the train go into the siding before No. 30 went north, that the conductor got off at the lower end of the siding to check on these 12 cars, to check his waybills against them, and determine whether they were all there so he might pick them up according to these waybills which had been given him by the agent, and that the conductor and the flagman at no time ever came back up to the north side of the siding until after Mr. Brady had been killed, the defendant saying and contending that the flagman, realizing that there was about to be placed again on the main line a part of this train while shifting operations were taking place, that he went down about half a mile so as to stop any train that might be on the main line coming north which might be into the block and cause a wreck with the caboose standing on the main line; that while the flagman was on the main line the conductor was checking the 12 coal cars to determine whether they were right and proper for his train under the waybills he had, and that then the engineer, with the fireman and Mr. Brady as the only brakeman operating the train, cut the four cars loose and Mr. Brady opened up the switch, and that Mr. Brady having previously set the derailer, that he forgot he had set the derailer and thereupon left it in operation and caused the wreck.

That that all came about through his negligence and carelessness, the defendant saying and contending that Mr. [fol. 123] Brady was not accustomed to night work and that he had not been doing a great deal of night work within the past 12 months, and having left in the afternoon before at Speneer and having been engaged continuously as the only brakeman when the flagman was on his particular job to make the train safe from collisions from the rear, that Mr. Brady had remained on duty an appreciable length of time, and not being accustomed to night work had gotten somewhat sleepy, and that he unconsciously set the derailer in motion after the caboose had passed, and closed the switch, and he forgot to remove the derailer or that he was not advertent to the orders that they were going back in at that

time and that they had gone in to let #30 pass by, and when they went out he closed the derailer, so the defendant says and contends that its agents, servants and employees were not negligent, that none of them did anything which brought about or produced Mr. Brady's death, but Mr. Brady himself did the thing there which produced his death; that is to say, defendant says and contends that he left the derailer on and when he signaled the engineer to bring the four cars back in for the purpose of picking up the 12, that he then caused the front of these four cars together with the remainder as they progressed and ran over the derailer, to come in contact with the derailer, to be lifted up and caused them to immediately leave the track, and that he brought about and produced his own death through no fault of defendant, and that you should, therefore, not be satisfied from the evidence and by its greater weight that the Railway Company through its agents, servants and employees was negligent, or, that if it was, that that negligence proximately produced and brought about Mr. Brady's death.

These, gentlemen, are some of the contentions of the parties as made from this evidence, as the Court recalls the evidence. The fact that I may not have—but I trust I have—recited or recapitulated to you gentlemen all of the contentions made by the parties is by no means an act on the part of either of the parties to forego that evidence or any contention made thereon.

[fol. 124] The case has been ably argued to you on both sides, and it is in the Court's opinion, without expressing an opinion to you having any weight, ably argued by capable counsel, so if you gentlemen should have some bit of evidence that has not been recapitulated, remember that neither side is foregoing any evidence, but relying upon it all, and use that evidence on your part to make up your verdict without regard to what your use of it would have on either party to the controversy.

The law requires that the Court recapitulate the evidence, but counsel have stated that because of the length of the trial that they would not demand that I recite all the evidence or recapitulate it all, but a fair statement of the contentions of the parties would suffice, insofar as the mandatory statute is concerned, so you will remember all the evidence and make up your verdict on it.

Now, gentlemen, the question you first approach is, are you satisfied from the evidence and by its greater weight

that the deceased, Mr. Brady, lost his life through the negligence of the defendant, and if you are so satisfied, was that negligence the proximate cause of his death?

Now, if you are, and so find by the greater weight of the evidence, then you would answer the first question yes. If you are not so satisfied, then not being so satisfied you would answer it no. So it narrows itself all down to that—what satisfaction has the plaintiff given you of her charges against the defendant? If they meet the requirements just recited by the Court as the primary instruction, you answer it yes; if they do not meet or fail to measure up to that requirement, you will answer that no.

There is a burden on the plaintiff to so satisfy you; there is no such burden on the defendant.

[fol. 125] Now, gentlemen, as an illustration, if you answer that first question NO, then you need not answer any of the other questions. That would be a complete answer to the controversy. If you answer it YES, you go forward to the other issues and make answer thereto as you believe the truth to be.

The second issue is: "Did the plaintiff's intestate assume the risk of being killed, as alleged in the answer?"

Now, gentlemen, that second issue relates to what is spoken of as assumption of risk. You see, you are dealing with a Federal statute known, as I have already said, as the Federal Employers' Liability Act, and in that statute passed by the Congress of the United States certain responsibilities and rights are set out, and the case is governed by that statute.

Now, there is in that statute as I will presently explain to you, what is known as the assumption of risk, when an action is brought under that Federal statute, and this second question comes to you for determination, and that question is: "Did the plaintiff's intestate assume the risk of being killed as alleged in the answer?"

The burden of that proof, gentlemen, is on the defendant, for among other things in the defendant's answer it sets out that though, as alleged, the plaintiff's intestate was not killed by any negligence which proximately produced his death that if he should have been that he assumed the risk under the Federal statute and the hazards of employment under the question of assumption of risk.

Among other things in that Federal statute, in cases where the plea of assumption of risk is available to the de-

fendant, as it is in this case, as a matter of law it is necessary for the defendant to set it up or plead it, as I have said in setting it up or pleading it the defendant has the burden of proof on the issue raised by his plea of assumption of risk.

An employee, gentlemen of the jury, and I give you this as the law applicable in part to that issue, is conclusively presumed to have knowledge of the hazard normally incident to the occupation in which he voluntarily engages, and he assumes the risk of injury arising therefrom. The burden of proof which the defendant must carry on the issue of assumption of risk is to show that the injury which the intestate of the plaintiff sustained resulted from one of the ordinary risks of the occupation, or from some defect which was obvious and fully known to the plaintiff's intestate and appreciated by the plaintiff's intestate or so plainly observable that he must be presumed to have known it.

In other words, except in cases where the violation of a statute enacted by Congress for the safety of employees has contributed to the injury—and there is no such charge in this case—two classes of risks are assumed by the employee under the Federal Rule, that is, Mr. Brady: first, ordinary risks, or those normally incident to the occupation, of which the employee is conclusively presumed to have knowledge, thus requiring no proof of such knowledge on the issue of assumption of risk; second, extraordinary risks, or those not normally incident to the occupation, which the defendant must show were either plainly observable and known to the employee and the dangers appreciated by him.

To defeat an action by the defense of assumption of risk, the employer must show not only that the servant knew of the negligence of which he complains but that he knew and understood, or ought to have known and appreciated, the increased danger to which he voluntarily exposed himself. There is a distinction between knowledge of defects or knowledge of alleged negligent acts, and knowledge of the risks resulting from such defects or acts.

[fol. 127] Assumption of risk, gentlemen, is founded on what we call in law a contract. The Federal Employers' Liability Act was enacted by Congress and sets out what the law is of one engaged in interstate commerce; then if one thereafter chooses to accept employment under that

law it is in the nature of what the law says is a contract between the parties.

Assumed risk is founded upon the knowledge of the employee, either active or constructive, of the risk to be encountered and his consent to take the chances of injury therefrom. The only kinds of knowledge which on the ground of assumption of risk will bar a recovery is actual or constructive knowledge.

Now, the defendant contends that the plaintiff's intestate assumed the risk of the negligence of a fellow employee, and that he assumed the risk ordinarily incident to the work he is about to engage in, and that you gentlemen should find from the evidence and by its greater weight, the burden being on the defendant, that the deceased assumed this risk, that that was part and parcel of the work he was engaged in.

It says and contends that railroading is a hazardous occupation, and that the compensation is based on a certain amount of hazards to be undertaken and that when he engaged in this work, nothing else appearing, under the evidence in this case the defendant says and contends that Mr. Brady assumed that risk, and that even if it was negligent, and its negligence was the proximate cause of the injury which resulted in his death, and you should so find and answer the first issue YES, that you should likewise so find from the evidence and by its great weight, the burden being on the defendant, that Mr. Brady assumed the risk, and that by such acceptance of his services that he assumed the risk which would proximately flow from the employment, and that you should find from the evidence and by its greater [fol. 128] weight and should answer that second issue YES.

The plaintiff, on the other hand, says and contends that Mr. Brady did not assume that risk; that he did assume the incidental risk of the danger which might flow from certain railroading conditions and circumstances, but he did not assume any such risk as might flow from the defects about which he had obviously no knowledge in the world or by the fact that the derailer was on, and the defect that she says exists in having no light on the derailer which would indicate to one working on the track that the derailer had been set contrary to regulation, by others, and that, therefore, the negligent maintenance of the derailer, the negligent failure to have lights, and taking together all the circumstances, that he had no way of knowing about this, that

it did not come about in ordinary railroading, and that, therefore, you should not find that to such extent he did assume such risk.

She, therefore, says and contends that you should answer the second question NO, that he did not assume that risk.

The Railway Company says and contends you should answer it YES.

You will remember all the evidence and then determine from the evidence what you believe the truth to be.

Now, for illustration, gentlemen of the jury, if you answer the first issue YES, then you go to the second issue. If you answer the first issue NO, you need not answer any of the other issues. If you answer the second issue YES, you then do not answer any of the other issues, because you have found, if you answer the first issue YES and second issue YES, that the plaintiff's intestate was killed by the negligence of the defendant that proximately produced his death, you find likewise, if you answer the second issue YES, that he assumed the risk as alleged in the answer, so if you answer the first issue YES and the second issue YES, you need not answer the remaining issues.

[fol. 129] If you answer the first issue YES and the second issue NO, you go to the third issue, which is "Did the plaintiff's intestate, by his own negligence, contribute to his own death, as alleged in the answer?"

That is the issue of contributory negligence, or what in law is called contributory negligence.

Under the North Carolina practice and in the absence of enforcement of the Federal Statute in the North Carolina Court, if one would be found to be guilty of contributory negligence and that cooperating and concurring with the negligence of the plaintiff which brought about his death, then there could not be any recovery, but under the Federal Employer's Liability Act and also under the State Statute relating to railroads—and I believe almost identically in the same language—where contributory negligence is pleaded, it does not bar a recovery, but only diminishes the amount of the recovery proportionate to the amount of contribution by way of negligence that the jury finds the plaintiff's intestate has in this case been guilty of, if you so find.

So you see you are dealing with a law or statute which is somewhat contrary to the ordinary means of trial in North

Carolina and certain rules that are laid down. In other words, if contributory negligence under the State law is successfully pleaded, with the exception of railroads, then that bars the action completely, but in a matter like this you compare the negligence under contribution and the negligence in main and you are still permitted to award a recovery, diminished however by the amount of comparative negligence you find the party seeking to recover guilty of; or chargeable with, so in the event you reach the third issue there is a question of contributory negligence and the burden of proof is on the defendant there, for the defendant sets up that, even though it was negligent and its negligence proximately caused the injury and death of the [fol. 130] deceased, Mr. Brady, and even though he did not assume the risk of his employment, under these facts that he was guilty of or chargeable with contributory negligence in the performance of his duties at that particular time, and that if you reach the third issue that you should then find that contribution to have been in some amount which would diminish the amount of recovery that you ultimately find under the other issues, if you do find that it would be compelled under a judgment to pay to the plaintiff as the representative of the deceased, in the event a recovery is had.

Now, that may seem to some of you gentlemen who have had previous experience in jury service as an anomalous situation, but it is permitted under the Federal law, and its enforcement under State practice in North Carolina is recognized.

Now, we have that statute, which is set out in the Federal Employers' Liability Act, as far as I have been able to determine, and I will read you this particular statute: "In all actions hereafter brought against any common carrier by railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

So, gentlemen, if you reach that third issue, I instruct you that contributory negligence is the negligent act of the plaintiff's intestate, as in this case it is charged, which concurring and cooperating with the negligent act of the defendant, Southern Railway Company, is the proximate cause of the alleged death of plaintiff's intestate.

The same rule of due care which the defendant, the Railway Company, is bound to observe applies equally to the [fol. 131] plaintiff in this case. There is really no distinction between the negligence in the plaintiff and the negligence in the defendant, except the plaintiff's negligence is called contributory negligence.

The test of contributory negligence, as in negligence, is, did the plaintiff exercise that degree of care which an ordinarily prudent man would have done under similar circumstances, and, if not, was his failure to do so the proximate cause of his injury?

Now, you see the contributory negligence under the third issue is just the reverse of the charge of negligence on the first issue.

The defendant says and contends that if it was negligent and its negligence proximately brought about Mr. Brady's death and you should answer the first issue YES, and you should not find from the evidence and by its greater weight that he assumed the risk of his employment and should answer the second issue NO and go to the third issue, that you should answer that YES, the defendant saying and contending that you should find that Mr. Brady in some degree was guilty of or chargeable with contributory negligence, the defendant saying and contending that he is the only man who could have set that derailer after the train had backed in and gone forward to leave the siding and go back on the main line to bring up the four cars and then pick up the twelve coal cars, the defendants saying and contending that Mr. Brady and the fireman and the engineer were the only ones on that train who went out of that siding with the freight train; that the conductor was below the grade crossing inspecting the coal cars, some 75 or 80 cars down the road, and the flagman was still further down, knowing that the train was going on to the main line and had stopped for shifting operations, to stop any trains coming from the south going north, and that only left Mr. Brady to take the train out and uncouple the cars and go back into the siding. [fol. 132] and that at that hour, after having worked all night, he was oblivious to his danger and that he unthoughtedly and carelessly and negligently set that derailer and then overlooked having set it and jumped onto the train, and he contributed jointly and concurrently with the alleged negligence of the defendant company in producing and bringing about his death, not that he intended to kill

himself, but he overlooked having set the derailer and he thereupon, the defendants says and contends contributed to his own injury and death, and that you should so find from the evidence by its greater weight, and should answer that issue YES.

The plaintiff says and contends you should answer it NO, the plaintiff saying and contending he did not set the derailer, that the conductor rode that train out of the side-track, and that the conductor was the last man in the train and Mr. Brady was up toward the front handling the front, and that though the flagman had gone down to flag for trains, the brakeman came up on the caboose and that the conductor set the derailer and then the conductor went on down, and plaintiff contends that Mr. Brady did nothing to contribute to his injury and death, and that you should not so find by the greater weight of the evidence and that failing to so find you should answer the third issue NO.

Without regard to how you find the third issue; you then go on to the fourth, fifth and sixth issues. If you reach the third question or issues and either answer it YES or NO, without regard to that you would then go to the fourth, fifth and sixth issues or questions, and use this doctrine on the fourth, fifth and sixth questions, depending on how you do answer the third question. If you answer the third question NO, finding he was not guilty of contributory negligence, then this rule I give you would not apply, but if you should find and by its greater weight, if you find that he did concur [fol. 133] and cooperate with the alleged negligence of the defendant company, then you would use this rule of comparing his degree of contributory negligence with the alleged negligence of the defendant Railway Company, in the fixing of the alleged damage on the fourth, fifth and sixth issues.

So, in a case against a common carrier by railroad to recover damages, or where such injuries have resulted in death, the negligence of the plaintiff or of the deceased employee is not a bar to a recovery, but it goes by way of diminution of damages in proportion to the negligence of the employee—that would be Mr. Brady in this case—as compared with the combined negligence of himself and the defendant Railway Company, as in this case; or, in other words, the carrier is to be exonerated to the amount of the causal negligence attributable to the employee. That is to say, if the carrier and the employee should both be

found guilty of negligence in an equal degree, which contributed to the injury—the negligences being equal—the jury should reduce the damages one-half. If it should be found that the employee, the intestate of the plaintiff, was guilty of more negligence than the Railway Company, then the damages should be diminished more than one-half. If it should be found that the employee, the intestate of the plaintiff, was guilty of less negligence than the defendant Company, then the damages should not be reduced as much as one-half.

Or, to state it differently: When the causal negligence is partly attributable to the employee and partly attributable to the defendant carrier, the plaintiff cannot recover full damages, or all the damages sustained by the employee or his beneficiaries, but only a proportional or fractional part thereof. The amount which the plaintiff may recover is to bear the same ratio, or proportion, to the full amount of damages sustained as the negligence attributable to [fol. 134] the defendant bears to the entire negligence, or combined negligence, attributable to both. It is the purpose of both statutes to abrogate the common-law rule, completely exonerating the defendant from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee.

So, you see, Gentlemen; under that rule I have just read you, that with regard to how you answer the third question, if you should answer it YES, finding that Mr. Brady did by his own negligence cooperating and contributing and concurring with the negligence of the defendant Railway Company, if you find the Railway Company was negligent, and answer the first issue YES, that his negligence proximately brought about his death, you would compare that negligence and on the 4th, 5th and 6th issues, award such amount of damages as is proportionate to the amount of negligence you find each party guilty of under the rule I have just read.

You remember all the contentions made by the parties on that, and then depending upon how you answer that issue, answer the other questions as you find the truth to be.

On the other hand, I repeat, if you are not satisfied by the greater weight of the evidence that he contributed to

his injury and death, so to speak, and answer it NO, then you are not bound by that rule of diminution of damages, but would award such damages as under the evidence and the law you believe the truth to be.

Then, Gentlemen, you reach the 4th, 5th and 6th questions; if you answer as I have instructed the answers to be, that would bring you down to those particular questions, and those are the questions which affect the damage. They are submitted separately, Gentlemen, and purposely so, as it is the Court's studied opinion, as I told you at the start, [fol. 135] to believe that the Supreme Court of North Carolina passed on what the United States Supreme Court has said, that they should be submitted separately, and they are submitted to you separately here.

The 4th issue reads: "What amount of damage, if any, is the plaintiff entitled to recover from the defendant for the benefit of Irene Brady, widow of plaintiff's intestate?"

Then the same thing as to the son, and the same thing as to the daughter, the two children to the marriage of Mrs. Brady, the representative of the deceased Mr. Brady.

You see, under the law she is appointed administratrix. Whatever is recovered, is recovered by her as such administratrix for her individual use and for the use of her two children named separately.

This is a statute which was passed by Congress in order to cover everything that might purposely be covered, and to award damages where damage is due, and in no other instance.

For instance, if Mr. Brady was not married and had a mother or father or some other one dependent on him, the recovery would be for their benefit, if he had no wife and children, and it is possible for one under this law, for one having no dependents, as I understand, to be killed by the Railway Company and no recovery to be had because there is no one dependent on him.

The statute, or portions of such, is as follows:

"Every common carrier by railroad, while engaging in commerce between any of the several States or Territories,
 * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving [fol. 136] widow or husband and children of such employee.

and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death, resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

The measure of damages under the Federal statute is what the beneficiaries named in the statute and any of them and no one else necessarily loses in or by the death of plaintiff's intestate, and in ascertaining these damages the jury is at liberty to take into consideration the age, health, and expectancy of life of the deceased, his earning capacity, his mode of treatment to his family, and the amount contributed out of his wages to their support, and calculate from these facts the amount the beneficiaries have lost, or may reasonably expect to lose, on account of the death of the deceased.

The damages recoverable are limited to the present cash value, or present worth, of such loss as results to the beneficiaries, occasioned by their being deprived of a reasonable expectation of pecuniary benefit by the wrongful death of the deceased employee.

It is held that the damages to be awarded in favor of a widow and minor child should include such sum as the widow might reasonably expect to receive from her husband for support, and such a sum as the children might reasonably expect to receive from their father for support during their minority.

Now, if you reach the 4th, 5th and 6th issues in your deliberations, the excerpts which I read you from the theory on the question of measure of damages is prevailing and you will accept that statement together with the [fol. 137] statements of law I am about to give you as your criterion for measuring the damage, if any, in this particular case.

Now, the measure of damages in this case, as I have already told you, is not the measure obtaining under the State law but is the measure of damages affixed by the Federal Employers' Liability Act and is brought for the benefit of such persons, to-wit: in this case the widow and

two minor children, so that the measure of damages in this case is the loss in money caused the widow and the two minor children by reason of the death of their husband and father. It is purely and entirely a matter of financial loss. How much money has the widow and the two minor children been deprived of by the death of their husband and father, computing the same at its present worth or value. It is not a question of how much the deceased, Mr. Brady, could have made for his own use had he lived out his allotted time, but the present value of that loss as shown to the beneficiaries. You must not undertake to give the equivalent or the value of human life, you will allow nothing for suffering or sorrow of either the deceased or those beneficiaries of his for whom this action is sought. You must not attempt to punish the Railway Company, but endeavor to give a fair and reasonable pecuniary value for the continuation of the life of the deceased to his wife and minor children.

Therefore, you will consider what sum of money, paid at the present time in a lump sum, would represent the fair value of what the widow and two children had a reasonable right to expect, under all the circumstances, and to receive from the earnings of their husband and father had he lived until their death, or their obtaining their majority and no longer be responsible as a liability of his by obtaining their majority.

As a basis on which to enable you to make your estimate [fol. 138] it is proper for you to consider the wages he was receiving, the age and health of the deceased, you will consider his habits, and prospects in life, the industry and skill of the deceased, the business in which he was engaged and his hazards as to life; you will consider how much of his earnings he spent on himself or otherwise, either for necessities or for other purposes, as distinguished from what he spent or gave to his wife and the minor children dependent upon him, if you find from the evidence that he contributed anything from his earnings to them, because the part of his wages that he spent on himself or for other purposes than that contributed to his wife and minor children, or what in the future they might reasonably expect he could contribute would be entirely eliminated from your calculation.

There is another limitation upon the amount that you will allow as damages, and that is this: You will allow

only the present value of what you may find the parties had lost in money because of the death of the deceased, for they are getting now in a lump sum that which they would have received from time to time during a future period. By this, you are not to understand that you are to ascertain the number of years the contribution would probably have continued and then multiply such number of years by the amount of such yearly contribution, but you are to give a sum of money which will represent the present value of such contributions.

You see, Gentlemen, whatever amount is awarded now, if there is any amount awarded and you reach the 4th, 5th and 6th questions, is in one lump sum now. If Mr. Brady had lived, those contributions to his wife and his two children would have been paid, if they were paid, over the years he might have lived and worked. You are not awarding any money for his death or any punishment to the Railway Company, but the Federal Employers' Liability Act was passed to make provision for those who were beneficiaries of the deceased, if there were any, in a lump sum, therefore, you will consider the amounts and the present value of that.

That rule may seem just a little ambiguous to you, but that is the rule laid down and that you will have to follow in making up your verdict in this case. That is a rule that has been approved by the Supreme Court to the extent that they have commented on it as being the right statement of the rule applicable to a case of this particular character.

The plaintiff says Mr. Brady was 45 years of age, and that he had a certain expectancy set out in the mortuary tables, and that nothing else appearing he would probably live 24.5 years, but under the rule I have given you that could only be considered in this particular way.

There was offered evidence tending to show his habits, that he was an industrious man, a working man, and also a man in good health; and the plaintiff also relies upon his expectancy. We have a statute which undertakes to re-cite expectancy of life of a person at a certain age, and that says a man 45 years of age, his expectancy is 24.5.

Now, that statute, because that it is inserted in the law, does not mean that you are to find that plaintiff's intestate would have lived 24.5 years. The statute is only evidence to be considered by you Gentlemen in connection with other

testimony in this case, and regardless of that statute, you should determine from the testimony how long the plaintiff's intestate would have probably lived and these contributions would have continued by his having so lived.

I hope, Gentlemen of the Jury, that I have given you the law applicable to this particular controversy. I realize that in the administration of the law that the lawyers and the Court in dealing with laymen sometimes give very con-[fol. 140] fusing statements, and I am confident of my limitations but believe that but for the circumscription of the law that I could in my feeble way undertake in the obligations of this most responsible position to give you a clearer conception of the law and better diagnose the facts, but for the way and manner in which this position is circumscribed by the law itself.

I could not express an opinion about any of it if I cared to; I do not have any opinion about this case, and if I have indicated to you by some ruling or otherwise that I have some opinion, please disabuse your minds of that, because I have not, but in the administration of the law the layman is sometimes obsessed with the idea that the law is fallacious as sometimes to be almost laughable by the things thrown in and hedged about which make somewhat difficult of understanding by the average man.

I have tried to be just as plain as I could. It is quite technical in many respects but I do hope that I have at least given you what I understand the law to be, and the rules applicable to this controversy, in such way as not to be confusing to you Gentlemen.

Before I conclude, Gentlemen, is there anything I could help the jury about at your request?

Gentlemen, I have undertaken to recite as best I could and as fully as I recall all the contentions of the parties, fairly and impartially, I hope. I certainly have no other disposition in mind. The case has been somewhat lengthy, it has involved a good deal of tiresome effort on your part, I am sure, continuously sitting, but it is a case of importance both to the plaintiff and to the defendant. It is a case that should be fairly handled by the jury and disposed of, in such a way as to ascertain what is the truth of the matter. The fact that the children are small, one of the beneficiaries [fol. 141] for whom the action is brought is the widow—that should not militate in their favor or against the defendant.

There is not any place, Gentlemen, for that type of conception in a democracy. You cannot and should not compel one to pay unless there is justification therefor. The fact that a railway company is the defendant and doing a large interstate railway business should not militate in its favor or against it. You should not, unless the evidence justifies it, take money from one and give to another, or compel one to pay money to another which it should not be entitled to pay.

The thing which has kept safely through all these years the jury system is the fact that men in fairness and justice believe that twelve men from the community in which the action is being tried realize and value the citizenship which is theirs, the rights of liberty and rights of property, and can best decide a mooted question submitted to them, rather than have a less number make decisions.

These parties all place confidence in you. The way not to violate that confidence is to speak from the evidence under the law the truth without regard to whether you help one and hurt another or help that one and hurt the other.

For your benefit, Gentlemen, with this admonition let me say if you answer the first issue NO, you should not answer the others. If you answer the first issue YES go to the second issue. If you answer the second issue NO, you go to the third. If you answer the second issue YES, you need not go any further. If you reach the third, and without regard to how you answer that, either YES or NO, then you would go to the 4th, 5th and 6th and answer those depending upon the way and manner in which you answer the 3rd; or if you answer the 3rd issue NO, then you award such damage as you find under the rules the damage to be. [fou. 142] If you answer the third issue YES, then you diminish the damages on the 4th, 5th and 6th as I have given you the law on the question of diminution and the question of where contributory negligence has been found under the statute.

The burden of proof is on the plaintiff on the 4th, 5th and 6th issues to establish from the evidence and by its greater weight the damage that the plaintiff has suffered or sustained for the beneficiaries named in the statute for whom the action is brought.

There is no burden of proof on the 4th, 5th and 6th issues on the defendant. The burden of proof is on the plaintiff.

on the 1st, 4th, 5th and 6th. The burden is on the defendant on the 2nd and 3rd issues.

Now, Gentlemen, please accept these series of issues or questions, pass on them intelligently, equitably and fairly and justly to the parties at the bar.

With that admonition you can retire and make up your verdict.

The defendant excepts to the foregoing charge of the Court for failure to comply with Section 564 of the Consolidated Statutes of North Carolina, in that the Court failed therein to declare and explain the law to the jury and to apply the law of negligence, contributory negligence, proximate cause and assumption of risk to the evidence in the case, and failed to instruct the jury as to the law applicable to the facts as they might be found by the jury, and failed to instruct the jury on the different aspects or phases of the evidence and to give the law applicable thereto, which is defendant's Exception No. 17.

[fol. 143] Judgment signed as appears in the record. To the signing of said judgment the defendant excepts. Exception No. 18.

ASSIGNMENTS OF ERROR

The defendant hereby groups its exceptions and makes its assignments of error thereon as follows:

1. That the Court erred in permitting J. Russell Holden, witness for plaintiff, to be asked and to answer the following questions, as set out in defendant's Exceptions Nos. 1 and 2, (R. p. 35):

Q. I am not asking you what happened on this occasion—but I am asking if you have had occasion to see trains back at the rate of speed of three or four miles over derailleurs from the opposite direction from which the derail was set?

A. Yes, sir, I have.

Q. Have you had occasion to see trains proceed down the pass track over the derailleurs which were set for derailment and seen these trains proceed over derailleurs in the direction for which the derailment was set?

A. Yes, sir, I have.

2. That the Court erred in finding and holding J. Russell Holden, witness for plaintiff, to be an expert as set out in defendant's Exception No. 3 (R. p. 37), as follows:

The Court: Are you offering him for the purpose of having him found to be an expert in order to propound an hypothetical question?

Mr. Hudgins: Yes, sir. And 219 North Carolina is the latest.

[fol. 144] The Court: I think he is entitled, with ten years experience, to have himself found as an expert for the purpose of expressing an opinion on the statement of facts.

Objection by defendant.

The Court: The Court so finds that for the purpose of expressing an opinion as inquired above by the Court, that the witness now on the stand is bound by the Court to be an expert brakeman, experienced in the movements of trains and is therefore qualified as such expert if he has an opinion to render such on the statement of facts submitted in the nature of an hypothetical question and to which the defendant in apt time excepts and to which finding the defendant in apt time objects and excepts.

3. That the Court erred in permitting J. Russell Holden, a witness for plaintiff, to be asked and to answer the following questions as set out in defendant's Exceptions Nos. 4, 5, 6 and 7 (R. pp. 37, 38 and 39):

Q. Mr. Holden, if the jury should find from the evidence and by its greater weight the following facts, that is assuming these to be the facts found in this case, that on the occasion when Mr. Earle Brady came to his death the pass track ran in a general north-south direction, generally parallel to the main tracks; that the derailer on the pass track was set and in place on the east rail for the purpose of derailing cars approaching from the south out of the pass track; that the west rail on the pass track and particularly the ball and edges of the same were decayed, rusty, old and badly worn down and worn away; that the cross-ties on which the pass track — at and about the point where the derailer was located sloped to the west; that at that time and under those conditions the car upon which the deceased was riding backed from the north over said pass track, at, along [fol. 145] and over said pass track at a speed of about three or four miles an hour on to the derailer, and that a derailment occurred, then based upon such facts and upon your

own personal experience as a railroad brakeman, do you have an opinion satisfactory to yourself as to what caused the derailment of the car upon which the deceased was riding at the time of the derailment? First, I want to know if you have an opinion?

A. I do.

Mr. Robinson: The defendant objects on the ground that the witness is not qualified as an expert in that he has not shown that his experience in seeing cars run over the wrong end of a derailer on two or three occasions was under circumstances substantially similar to those involved in this case.

Secondly, because the information is based on facts not in evidence since there is no evidence on the part of the plaintiff that the wheels opposite the derailer dropped inside the alleged defective rail rather than on the outside of the rail.

Thirdly, because there is no evidence as to the number of cars backed in or as to whether they were empty or loaded cars. And because the question calls for guess or speculation or surmise upon an issue solely within the province of the jury.

Q. Now, what is that opinion?

A. In my opinion it was caused by this inferior rail.

Q. Which inferior rail?

A. Over here at Hurt.

Q. Which particular rail under those assumed facts?

A. It looks as though the west rail.

Q. That is the rail opposite the derailer on the pass track?

A. Yes, sir.

Defendant moves to strike the foregoing answer.

[fol. 146] 4. That the Court erred in permitting J. D. Heritage, witness for the plaintiff, to be asked and to answer the following questions as set out in defendant's Exceptions Nos. 8 and 9 (R. p. 44):

Q. Have you ever seen a cut of cars pass over a derailer of that type from the direction in which the derailer was set?

A. I have seen them go to it.

Q. Have you ever seen a cut of cars go on to the derailer from what has been called the wrong end, that is the opposite end from which the derailer is set?

A. Yes, sir.

5. That the Court erred in finding and holding J. D. Heritage, witness for plaintiff, to be an expert as set out in defendant's Exception No. 10 (R. p. 44) as follows:

The Court: At this point obedient to a previous ruling and advertent to the length of service that the witness testified that he had served for the Southern Railway Company as a brakeman, the Court is of the opinion and so holds that the witness is an expert, qualified to speak on and to answer an hypothetical question along the line of his qualifications as an expert and for that purpose and that purpose only. Objection by the defendant to the foregoing ruling.

6. That the Court erred in permitting J. D. Heritage, witness for plaintiff, to be asked and to answer the following questions as set out in defendant's Exceptions Nos. 11 and 12 (R. pp. 45-46):

Q. Mr. Heritage, if the jury should find from the evidence and by its greater weight the following facts, that is, assuming these to be the facts found in this case, that on the occasion when Mr. Earle Brady came to his death the pass [fol. 147] track ran in a general north-south direction, generally parallel to the main tracks; that the derailer on the pass track was set and in place on the east rail for the purpose of derailing cars approaching from the south out of the pass track; that the west rail on the pass track and particularly the ball and edges of the same were decayed, rusty, old and badly worn down and worn away; that the cross-ties on which the pass track — at and about the point where the derailer was located sloped to the west; that at that time and under those conditions the car upon which the deceased was riding backed from the north over said pass track, at, along and over said pass track at a speed of about three or four miles an hour on to the derailer, and that a derailment occurred, then based upon such facts and upon your own personal experience as a railroad brakeman, do you have an opinion satisfactory to yourself as to what caused the derailment of the car upon which the

deceased was riding at the time of the derailment? First, I want to know if you have an opinion?

A. I do.

Q. What is that opinion as to what caused it?

Mr. Robinson: Defendant objects on the ground that the witness is not qualified as an expert in that he has not shown that his experience in seeing cars run over the wrong end of a derailer on two or three occasions was under circumstances substantially similar to those involved in this case.

Secondly, because the information is based on facts not in evidence since there is no evidence on the part of the plaintiff that the wheels opposite the derailer dropped inside the alleged defective rail rather than on the outside of the rail.

Thirdly, because there is no evidence as to the number [fol. 148] of cars backed in or as to whether they were empty or loaded cars. And because the question calls for guess or speculation or surmise upon an issue solely within the province of the jury.

A. The derailment would be due to the defective rail on the west side, on the west track. The derailment would be due to the defective rail on the west track. (Witness examines picture marked for identification "D-2"). Looking at the derailer from the north end of the opposite end from which it is set I observe a groove in it. That groove is to keep your wheel from dropping over on the outside of the rail when the car approaches from the north in the opposite side from which the derailer is set. When the flange of your wheel comes along here (indicating) it comes on the inside of that groove. If you will notice here, this groove runs out to right here. The high part of the derailer starts in there. That naturally would keep it from going on over. The flange of the wheel comes right up in this groove and drops over here and this groove being in line, the wheel would naturally come down on the rail because this high place in your derailer here would keep it from sliding along. If the derailer were out of line to the west it would have a tendency to twist your truck or wheel this way causing it to drop off or force this wheel on this side to the west. The defective west rail would not have, if the ball was going down, would not have enough ball to hold the wheel. There-

fore, the wheel would climb over and cause a derailment to the west.

7. That the Court erred in overruling defendant's motion for judgment as of nonsuit made and renewed at the close of all of the evidence, as set out in defendant's Exception No. 14 (R. p. 103).

[fol. 149] 8. That the Court erred in refusing to submit issues tendered by the defendant in apt time, and in submitting issues as set out in the judgment, as set out in defendant's Exceptions Nos. 15 and 16 (R. pp. 103-104), the issues tendered by the defendant being as follows:

1. Was the death of plaintiff's intestate caused by the negligence of the defendant, as alleged in the complaint?

Answer —

2. Did plaintiff's intestate assume the risk of his death, as alleged in the answer?

Answer —

3. Did plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer?

Answer —

4. What damage, if any, is plaintiff entitled to recover?

Answer —

9. That the Court erred in failing to comply with Section 564 of the Consolidated Statutes of North Carolina in the respects set out in Exception No. 17 (R. p. 142), as follows:

The defendant excepts to the foregoing charge of the Court for failure to comply with Section 564 of the Consolidated Statutes of North Carolina, in that the Court failed therein to declare and explain the law to the jury and to apply the law of negligence, contributory negligence, proximate cause and assumption of risk to the evidence in the case, and failed to instruct the jury as to the law applicable to the facts as they might be found by the jury, and failed to instruct the jury on the different aspects or phases of the evidence and to give the law applicable thereto, which is defendant's Exception No. 17 (R. p. 142).

10. That the Court erred in signing the judgment appearing [fol. 150] in the record, as set out in defendant's Exception No. 18 (R. p. 143).

W. T. Joyner, R. M. Robinson, Attorneys for Defendant, Southern Railway Company, Appellant.

SERVICE OF TRANSCRIPT

Service of the foregoing transcript of the record and statement of case on appeal by the defendant, Southern Railway Company, appellant, accepted and copy acknowledged, and service of copies of exhibits waived.

This 1st day of August, 1942.

Frazier & Frazier, D. E. Hudgins, Attorneys for
Plaintiff, Appellee.

AGREEMENT OF COUNSEL AS TO TRANSCRIPT—August 1, 1942

It is hereby stipulated and agreed that the foregoing shall constitute the transcript of the record on appeal to the Supreme Court in the case of Irene Brady, Administratrix of the estate of Earle A. Brady, deceased, plaintiff, v. Southern Railway Company, defendant.

This 1st day of August, 1942.

Frazier & Frazier, D. E. Hudgins, Attorneys for
Plaintiff, Appellee.

W. T. Joyner, R. M. Robinson, Attorneys for Defendant,
Southern Railway Company, Appellant.

NOTES RE APPEAL BOND AND CLERK'S CERTIFICATE

(Appeal bond in the sum of \$100.00 filed.)

(Transcript certified by Clerk Superior Court.)

[fol. 151] IN SUPREME COURT OF NORTH CAROLINA, FALL
TERM, 1942.

No. 668

IRENE BRADY, Administratrix of the Estate of Earle A.
Brady, Deceased,

v.

SOUTHERN RAILWAY COMPANY

OPINION

Appeal by defendant from *Warlick, J.*, at March Terms, 1942 of Guilford. Reversed.

This was an action under the Federal Employers' Liability Act to recover for the wrongful death of plaintiff's

intestate alleged to have been caused by the negligence of the defendant.

Plaintiff's intestate was a brakeman employed by the defendant in interstate commerce, and was killed while so engaged. It was alleged that while he was a member of the crew of a freight train and engaged in shifting cars, at night, at Hurt, Virginia, a freight car on which he was standing, in order to signal switching operations, struck a derailler, and that in consequence the car was derailed, and he lost his life. The complaint alleged that his injury and death was due to the negligence of the defendant in that it failed to provide for him a reasonably safe place in which to work; that the track and instrumentalities at that point were worn and defective and the derailler improperly installed. It was also alleged that the defendant failed to provide a light or other warning to show that the derailler was at the time closed.

The defendant denied the several imputations of negligence, and also pleaded that plaintiff's intestate had assumed the risk of injury in the way in which he was injured, and that by his own negligence he had contributed to his injury and death.

Issues raised by the pleadings were submitted to the jury, and verdict rendered in favor of the plaintiff, finding that the death of plaintiff's intestate was due to the negligence of the defendant, that he did not assume the risk of being killed as alleged in the answer, nor by his own negligence contribute to his injury and death. Substantial damages for the benefit of the widow and dependent children of the [fol. 152] decedent were awarded. From judgment in accordance with the verdict, defendant appealed.

Frazier & Frazier and D. E. Hudgins for plaintiff, appellee.

W. T. Joyner and R. M. Robinson for defendant, appellant.

DEVIN, J.

The question chiefly debated on the appeal was whether the evidence offered by the plaintiff was sufficient to carry the case to the jury. The defendant assigns error in the failure of the court below to sustain its motion for judgment of nonsuit. The determination of this question requires a careful consideration of the evidence adduced at

the trial as shown by the record before us. The material facts as thus made to appear may be stated as follows:

The plaintiff's intestate was a member of the train crew in charge of a freight train proceeding north, during the early morning hours of 25 December, 1938. There were thirty-seven cars in the train. The crew consisted of five, viz.: engineer, fireman, conductor, flagman, and the brakeman, who was plaintiff's intestate. No other person was on or about the train at the time of the injury.

At Hurt, Virginia, the train stopped and backed into a siding or pass track to permit a northbound passenger train to pass. At this place the railroad ran north and south and there were four tracks, counting from west to east, as follows: house track, main line southbound, main line northbound, and a pass track, the easternmost of the tracks. On this pass track, near its northern terminus and a short distance south of the switch was located, on the east rail, a derailer. A derailer is a heavy metal safety device placed near the rail and controlled by a lever to enable it to be pulled close against the rail, so that when so placed the inclined groove and flange on the derailer will serve to guide a car wheels onto and across the top of the rail, and derail the car. Its purpose is to prevent freight cars on the sidetrack, which for any reason might be set in motion, from rolling down the track and onto the main line. The derailer is placed near the downgrade end of the side or pass track, and is ordinarily kept closed—that is, pulled up to the rail—so that a car moving toward the switch would be derailed.

On this particular pass track the grade was northward, [fol. 153] and the derailer was connected to the east rail and so placed that when closed it would derail a car moving northward, that is with the derailer's upward inclination and flange, for the guidance of a car wheel, extending northward and outward. On the opposite side of the derailer, called by the witnesses the "blunt" or "wrong end," instead of presenting an inclined surface and flange, the derailer presented an end vertically abrupt, extending some three or four inches above the level of the crossties on which it was placed and sloping to the right. It appears from the photograph used in evidence that the flange designed to guide the car wheel over the rail when approaching from the "right" side, would tend to deflect the wheel in the

opposite direction when the derailer was struck on the "wrong" end.

The freight train arrived at this point about 6 a. m. and the occurrences complained of took place while it was yet dark, and trainmen used lanterns. The switching operations there were performed in the following sequence: The freight train pulled past the northern switch of the pass track, and the conductor got off, opened the switch and opened the derailer. The train backed into the pass track, and the switch and derailer were closed by the brakeman. There were twelve freight cars at the south end of the pass track which were to be picked up by this freight train. These were south of the south end of the train. The conductor and flagman then went to check up these twelve cars, seventy-five or eighty car-lengths from the north end of the pass track. After the passenger train passed, the north switch and the derailer were opened by the brakeman. The engineer, whose testimony was offered by the plaintiff, said he saw the brakeman set the derailer open. The freight train then pulled out on the main line, the switch was closed, and the freight train backed south along the main line track, south of a highway crossing. The brakeman then cut off four empty gondola shaped coal cars next to the engine, and the engineer with these empties, the brakeman on the rear, moved north beyond the switch for the purpose of backing into the pass track and picking up the twelve freight cars, which with the four empty coal cars were to be carried to Lynchburg. On this movement, the brakeman got off at the switch, opened the switch and got on the end of the rearmost coal car, standing on the metal step, on the [fol. 154] southeast corner of the car, and with his lantern signaled to the engineer the movement of the engine and cars into the pass track. This cut of cars was moving at the rate of three or four miles per hour. When the lead coal car on which the brakeman was standing reached the derailer, it was found to be closed, and the wheels of the car struck the blunt or wrong end of the derailer, with this result. The front trucks of the lead coal car were derailed to the west, the brakeman was thrown off in some way, and was crushed under the wheels. The rear trucks of the lead coal car remained on the track. The front trucks of the next car were derailed to the east, the front trucks of the third car were derailed to the west, and those of the fourth

car to the east. The rear trucks of each of the cars remained on the track. No rails were broken or track torn up.

Here a pertinent question arises. When the freight train pulled out of the pass track onto the main line, who closed the derailer? No witness has testified he saw the brakeman do so, but the conclusion seems inescapable from the circumstances disclosed by the testimony of the engineer (offered by plaintiff) that no one else could possibly have done so. He was the last man to touch the derailer. He opened it, together with the switch, for the freight train to pass out. He closed the switch for the movement of the train south on the main line. It was his job to look out for the switch and the derailer. When the cut of empty cars a few minutes later came back into the pass track the derailer was found closed. No one else but the brakeman had been there or had opportunity to touch it. The engineer and fireman were on the engine. The conductor and flagman were more than a quarter of a mile away. The conductor was checking the twelve cars, and the flagman flagging the south end of the freight train. There was no other trainman, or any other person, present. The opening and closing of the derailer was effected by a lever operated by hand. It was in no sense automatic.

The gravamen of plaintiff's complaint and the evidence upon which she bases her case was that the west rail of the pass track, opposite the derailer, was worn and defective, causing a slope westward, so that when the front wheel of the coal car struck the blunt end of the derailer, the defective condition of the west rail, in its relation to the derailer, caused the car to jump the track to the west; that if the west rail had been level and of proper height the wheels would likely have remained on the track in spite of the jolt from contact with the wrong end of the derailer. The plaintiff offered the testimony of two witnesses to the effect that the west rail was old and worn, that the ball or top of the rail was very thin and badly worn; that metal slivers were picked from the top of the rail and along on each side; that the crossties on which the derailer was resting slanted to the west; that the west rail had the date of 1912 stamped on it.

The plaintiff then presented two experienced railroad brakemen who had had ten years' experience as brakemen, switching on yards and making up trains, and offered them.

as expert witnesses. The court found them to be experts and permitted them to express their opinions in response to hypothetical questions. The hypothetical question propounded to each of those expert witnesses embraced the facts in evidence and was based on the finding by the jury that "the west rail on the pass track and particularly the ball and edges of the same were decayed, rusty, old and badly worn down and worn away; that the crossties, on which the pass track at and about the point where the derailer was located, sloped to the west." The question called for the expression of an opinion on these assumed facts as to what caused the derailment of the car upon which the deceased was riding. One of the expert witnesses, Mr. Holden, replied: "In my opinion it was caused by the inferior rail—that is, the rail opposite the derailer on the pass track." The other witness, Mr. Heritage, replied: "The derailment would be due to the defective rail on the west side." This witness also testified, from an examination of a photograph which had been offered to illustrate the testimony of witnesses, that on the derailer there was a groove which the flange of a car wheel coming from the wrong direction could follow if in line and this would tend to cause the wheel to come down on the rail, but if the derailer was out of line to the west it would have a tendency to twist the wheel that way, and the defective west rail would not have enough "ball" to hold the wheel and it would be likely to climb over and cause derailment; that the worn condition of the rail would tend to widen the gauge. He further testified that by reason of defective or worn condition [fol. 156] of the west rail, when a car hit the wrong end of the derailer, it might cause the wheels to go outside the flange on the derailer, instead of into the groove, and thus throw the car to the west. However, to cause the wheel on the car coming in contact with the wrong end of the derailer to go outside the flange, the opposite rail would have to be badly defective—that is, three-quarters of an inch would have to be worn away from the ball of the rail. The original width of the ball would be two and a half to two and three-quarters inches wide. He also testified that it was the duty of the brakeman to see that the derailer was open before signaling the engineer to back into a pass track.

Neither of these expert brakemen had seen more than two or three instances in their long experience where car wheels

had struck the wrong end of a derailer. It appeared that that was never intended, was always to be avoided, and rarely happened. The derailer was not designed to afford passage over it by a wheel coming from the wrong direction.

There was no evidence that the gauge of the rails had been affected. There does not seem to be any evidence, or allegation, that the derailer itself was other than the ordinary type of derailer in general and approved use by railroads in this section, nor that there was anything broken or out of repair about this solid piece of iron or the lever by which it was controlled.

It may be observed that the rails on a pass track, as well as on all other tracks, are placed for the purpose of providing means for the passage of trains and cars. While there was evidence here that the west rail on the pass track opposite the derailer was old and worn, it had proved adequate to bear the weight of a long freight train and heavy engine which twice passed safely over it immediately before the four empty coal cars were derailed. Was the defendant negligent in failing to foresee that if the wheel of a freight car should strike the wrong or blunt end of the derailer, the worn place in the west rail opposite would cause the car to be derailed? Could the defendant, in the exercise of due care, have foreseen that retaining on its pass track a rail which was worn on top, but adequate for the passage over it of trains, would cause the derauling of a freight car and injury to a trainman in the unusual event the freight [fol. 157] car should strike the wrong end of a derailer? The defects in the rail could only have caused injury in the event the wheels of a car struck the derailer on the blunt end, that is, coming from the opposite direction from that in which the derailer was intended to serve its useful purpose. Striking a derailer from the wrong direction, it appears from the evidence, was so unusual; so contrary to the purpose for which the derailer was placed and the use to which it was applied, that prevision to guard against possible consequences of such a contingency could hardly be charged to the railroad company. The contingency was remote so that we feel constrained to express the opinion that the duty to guard against it, in the exercise of due care, was more than should have been imposed upon the defendant, and that responsibility should not attach for the unexpected consequences, however deplorable.

Where the duty to guard against injury to others grows out of certain relationships and circumstances, breach of such duty imposes responsibility for consequences which are probable, and which could reasonably have been foreseen, according to ordinary and usual experience, but not for consequences which are merely possible according to occasional experience. *Stone v. R. R.* 171 Mass., 536, 41 L. R. A., 794. "The rule is that one is bound to anticipate those consequences of his negligent act or omission which in the ordinary course of human experience, might reasonably be expected to result therefrom." 38 Am. Jur., 710. Foreseeability is a necessary element in actionable negligence, and must be made to appear before liability can be imposed for the consequences of a wrongful act or omission. This principle was stated in *Osborne v. Coal Co.*, 207 N. C., 545, 177 S. E., 796, as follows: "The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor." This statement of the law has been frequently cited with approval, and the principle applied in numerous cases. - *Butner v. Spease*, 217 N. C. 82; 6 S. E. (2d), 808; *Guthrie v. Gocking*, 214 N. C., 513, 199 S. E., 707; *Newell v. Darnell*, 209 N. C., 254, 183 S. E., 374; *Beach v. Patton*, 208 N. C., 134, 179 S. E., 446. *Justice Cardozo*, in *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N. Y., 47, expressed the same idea in these words: "The wrongdoer may [fol. 158] be charged with those consequences only within the range of prudent foresight." In *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S., 469, it was said that "it must appear that the injury was the material and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." From *Stone v. R. R.*, *supra*, we quote, "One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable." *Snyder v. R. R.*, 36 Col., 288.

"The substance of it all, stated and restated in various ways, is that negligence carries with it liability for consequences which, in the light of attendant circumstances, could

reasonable have been anticipated by a prudent man, but not for casualties which, though possible, were wholly improbable. One is not charged with foreseeing that which could not be expected to happen." *Wyatt v. Potomac Tel. Co.*, 158 Va., 470, 163 S. E., 370.

Negligence was also charged against the defendant for failure to light the derailer. It was testified, however, that lights were not used on derailers outside of yards, and the engineer testified he had not seen lights on a derailer. The fact that there was no light on the small target indicating the position of the derailer in question, under the circumstances of this case, would not alone be evidence of negligence, in the absence of showing that placing lights on such targets was in accord with general and approved usage. *Pleasant's v. Barnes*, 221 N. C., 173. The testimony of a witness that at some time subsequent to the injury he saw, in the daytime, a light on this target could not be held competent to show negligence. *Parrish v. R. R.*, 221 N. C., 292 (299), 139 S. E., 232; *Shelton v. R. R.*, 193 N. C., 670, 139 S. E., 232; *Lowe v. Elliott*, 109 N. C., 581, 14 S. E., 51.

There was no evidence that the derailer in this case would not properly perform the function for which it was designed and installed, as was the case in *Mumpower v. R. R.*, 174 N. C., 742, 94 S. E., 515.

[fol. 159] While the plaintiff does not invoke the doctrine of *res ipsa loquitur* or refer to it as ground for denial of defendant's motion for nonsuit, in view of the evidence that plaintiff's intestate came to his death as the result of the derailment of a freight car, we have considered the question, and reach the conclusion that the principle expressed by that phrase is inapplicable to the facts of this case. Here, all the facts relating to the derailment of the car are known, and the particular cause thereof is alleged in the complaint, and fully set forth in plaintiff's evidence. The case was fought out on ground selected by the plaintiff. Under the circumstances of this case we are not inclined to hold that the fact of the derailment of the front trucks of the freight car on which the brakeman was riding is alone sufficient to make out a *prima facie* case of actionable negligence and carry the case to the jury on the theory that "the thing itself speaks." *Baldwin v. Smitherman*, 171 N. C., 772, 88 S. E., 854; *White v. Hines*, 182 N. C., 275, 109 S. E., 31; *Clodfelter v. Wells*, 212 N. C., 823, 195 S. E., 11.

In addition to what we must regard as the failure of the plaintiff to show that the injury and death of her intestate was the proximate result of actionable negligence on the part of the defendant, there is another ground upon which we think the plaintiff's case must fail. The plaintiff's evidence points unerringly to the conclusion that the brakeman himself, unfortunately failed to open the derailer, or to see that it was open, before he signaled the engineer to move the four cars into the pass track. Hence having himself handled the derailer, and having neglected to place it open for this last movement of cars, as it was his duty to do, he would be conclusively deemed to have assumed the risk of an injury which was caused by his own act or omission. *Southern Ry. Co. v. Youngblood*, 286 U. S., 313; *Unadilla Valley Ry. v. Caldine*, 278 U. S., 139, 73 L. Ed., 224 (note). And his negligence in this respect would be regarded as the sole proximate cause of his injury. *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88; *Butner v. Spease*, *supra*; *Jeffries v. Powell*, 221 N. C., 415. The amendment of 1939 to the Federal Employers' Liability Act is inapplicable here. *McCrowell v. R. R.*, 221 N. C., 366 (377).

[fol. 160] This case is an important one to the parties, and its decision is not without difficulty. Counsel for both plaintiff and defendant presented their respective causes with ability, and their excellent briefs have been of assistance. After careful consideration, we reach the conclusion, that defendant's motion for judgment of nonsuit should have been allowed, and that the judgment of the Superior Court must be

Reversed.

[fol. 161] IN NORTH CAROLINA SUPREME COURT, FALL TERM,
1942, GUILFORD COUNTY

No. 668

IRENE BRADY, Administratrix of the Estate of EARLE A.
BRADY, Deceased,

VS.

SOUTHERN RAILWAY CO.

JUDGMENT—Entered December 16, 1942

The cause came on to be argued upon the transcript of the record from the Superior Court of Guilford County:—upon

consideration whereof, this Court is of opinion that there is error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable W. A. Devin, Justice, be certified to the said Superior Court, to the intent that the Judgment is Reversed. And it is considered and adjudged further, that the Plaintiff, do pay the costs of the appeal in this Court incurred, to-wit, the sum of Two and 70/100 dollars (\$2.70), and execution issue therefor.

(S.) Adrian J. Newton, Clerk of the Supreme Court.
(Official Seal of the Supreme Court of the State of North Carolina.)

[fol. 162] IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

IRENE BRADY, Administratrix of the Estate of EARLE A. BRADY, Deceased,

v.

SOUTHERN RAILWAY COMPANY

DOCKET ENTRIES AND CLERK'S CERTIFICATE

Appeal Docketed 3 August, 1942

Case Argued 2 December, 1942

Opinion Filed 16 December, 1942

Final Judgment Entered 16 December, 1942

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina; do hereby certify the foregoing to be a full, true and perfect copy of the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

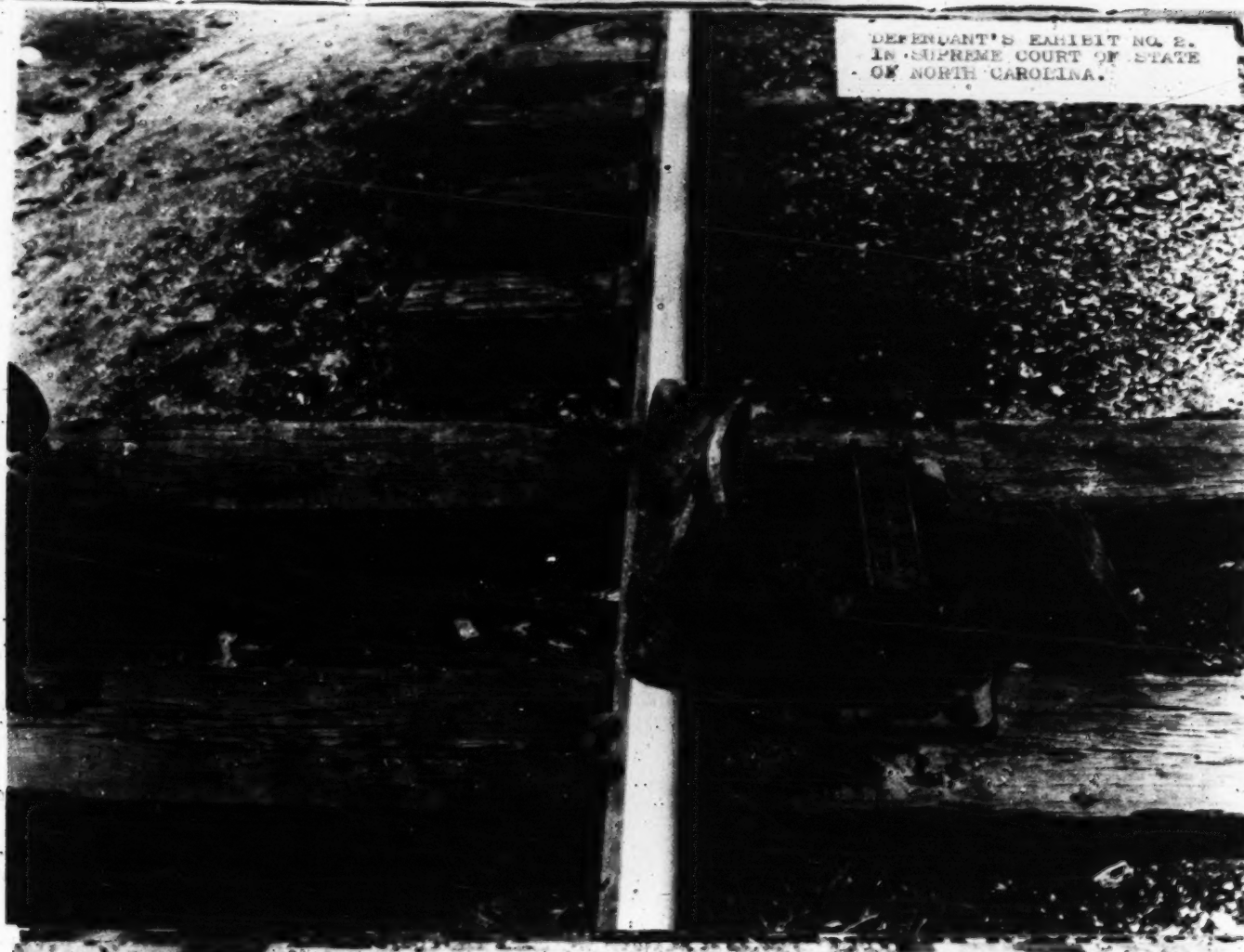
I further certify that no petition to rehear has been filed, and that the time for filing such petition under the rules of this Court has expired.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this March 10, 1943.

(S.) Adrian J. Newton, Clerk of the Supreme Court of the State of North Carolina. (Official Seal of the Supreme Court of the State of North Carolina.)



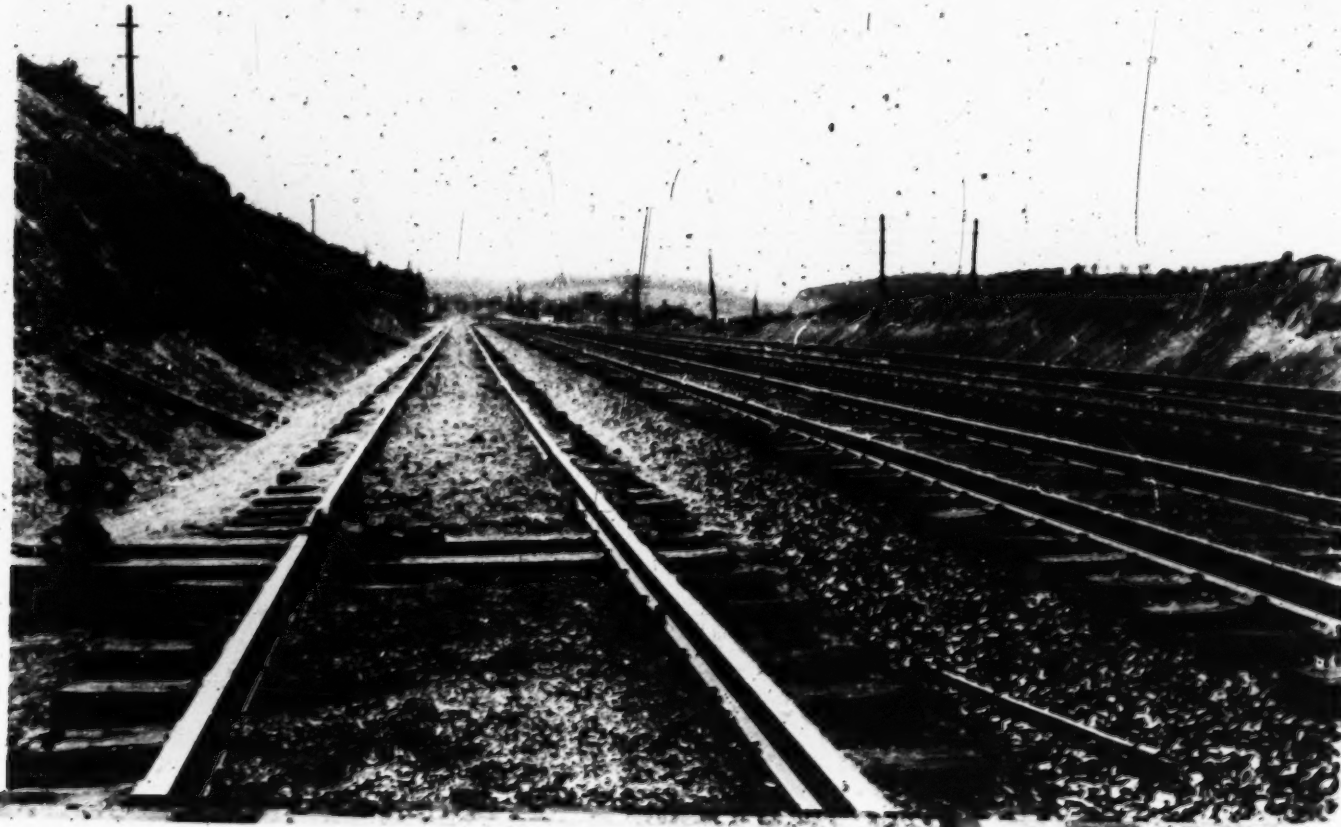
DEFENDANT'S EXHIBIT NO. 2.
IN SUPREME COURT OF STATE
OF NORTH CAROLINA.



DEFENDANT'S EXHIBIT NO. 3.
IN SUPREME COURT OF STATE
OF NORTH CAROLINA.



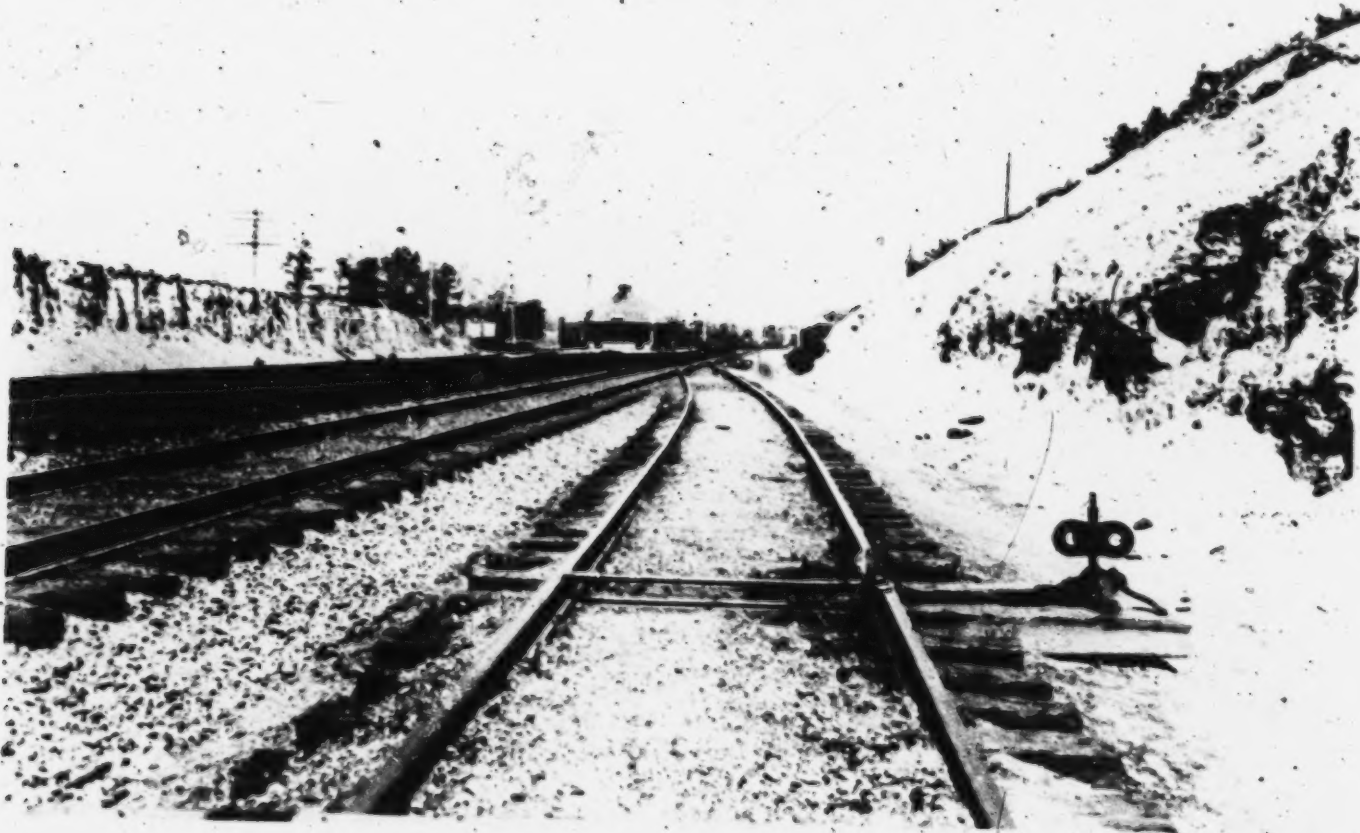
DEFENDANT'S EXHIBIT NO. 4.
IN SUPREME COURT OF STATE
OF NORTH CAROLINA.



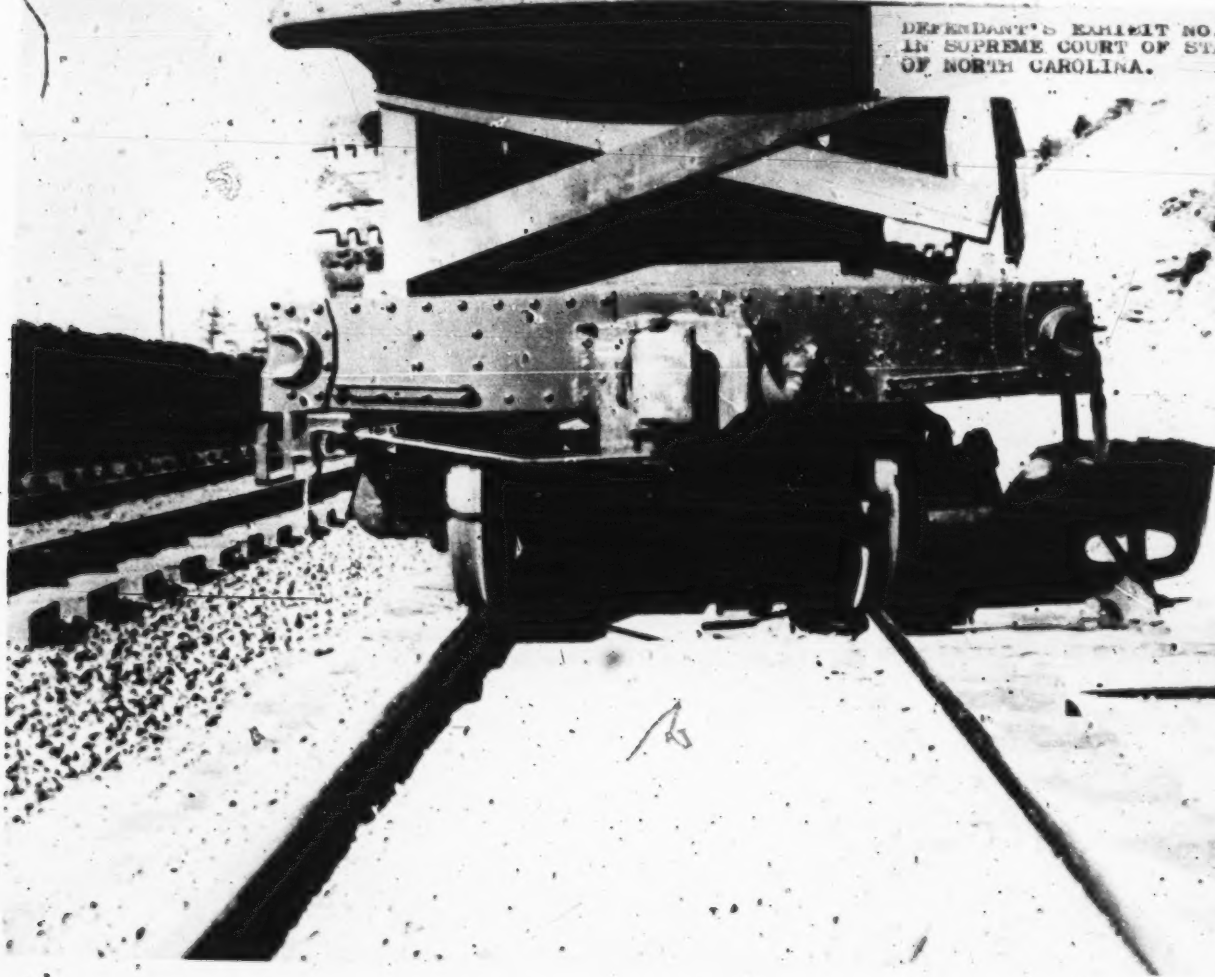
DEFENDANT'S EXHIBIT NO. 5.
IN SUPREME COURT OF STATE
OF NORTH CAROLINA.



DEFENDANT'S EXHIBIT NO. 6.
IN SUPREME COURT OF STATE
OF NORTH CAROLINA.



DEFENDANT'S EXHIBIT NO. 7.
IN SUPREME COURT OF STATE
OF NORTH CAROLINA.



[fol. 170] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1942

No. 830

[Title omitted]

ORDER GRANTING CERTIORARI—May 3, 1943

On Petition for Writ of Certiorari to Supreme Court of
the State of North Carolina.

A petition for rehearing having been filed in this case
upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court
that the said petition for rehearing be, and the same is
hereby, granted.

It is further ordered that the order denying certiorari be,
and the same is hereby, vacated; and that the petition for
writ of certiorari herein be, and the same is hereby, granted.

It is further ordered that the duly certified copy of the
transcript of the proceedings below which accompanied
the petition shall be treated as though filed in response to
such writ.

May 3, 1943.

Endorsed on Cover: File No. 47,331. North Carolina,
Supreme Court. Term No. 830. Irene Brady, Administra-
trix of the Estate of Earle A. Brady, Deceased, Petitioner,
vs. Southern Railway Company. Petition for a writ of cer-
tiorari and exhibit thereto. Filed March 15, 1943. Term
No. 830 O. T. 1942.

(6432)

IN THE
Supreme Court of The United States

OCTOBER TERM, 1942

No. **830** 26

IRENE BRADY, Administratrix of the Estate of
EARLE A. BRADY, Deceased,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
NORTH CAROLINA AND BRIEF
IN SUPPORT THEREOF

✓ JULIUS C. SMITH,
Greensboro, North Carolina,
Counsel For Petitioner.

C. CLIFFORD FRAZIER,
D. E. HUDGINS,
WELCH JORDAN,
Of Counsel

INDEX TO PETITION AND SUPPORTING BRIEF

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TABLE OF CASES CITED

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<i>Jones v. East Tennessee, V. and G. R. Co.</i> , 128 U.S. 443, 32 L. ed. 478, 9 S. Ct. 118	8
<i>Lilly v. Grand Trunk Western R. Co.</i> ,..... U.S..... 87 L. ed. (Advance Opinions) 323, S. Ct.....	6, 9
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<i>McGraw v. Southern R. Co.</i> , 206 N.C. 873, 175 S.E. 286; 209 N.C. 432, 184 S.E. 31	13
<i>Norman v. Baltimore and Ohio R. Co.</i> , 294 U.S. 240, 79 L. ed. 885, 55 S. Ct. 407	5
<i>Norris v. Alabama</i> , 294 U.S. 587, 79 L. ed. 1074, 55 S. Ct. 579	5
<i>Tiller v. Atlantic Coast Line R. Co.</i> , U.S.; 87 L. ed. (Advance Opinions) 446, S. Ct. 5, 6, 8, 9, 13, 14, 15, 16	
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

No.

IRENE BRADY, ADMINISTRATRIX OF THE
ESTATE OF EARLE A. BRADY, DECEASED,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NORTH
CAROLINA.

TO THE HONORABLE THE SUPREME COURT OF THE
UNITED STATES:

Your petitioner, Irene Brady, Administratrix of the Estate of Earle A. Brady, deceased, prays this Court to review on writ of certiorari a judgment of the Supreme Court of the State of North Carolina in the case of Irene Brady, Administratrix of the Estate of Earle A. Brady, deceased, v. Southern Railway Company, rendered on the 16th day of December, 1942, and based upon a written opinion by that Court filed on the same date.

Page references hereinafter made are to the record as printed in the court below, as supplemented by the printed proceedings and opinion in the court below.

PART I. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Petitioner brought this action in the state court of North Carolina under the Federal Employers' Liability Act, 45 USCA Sec. 51, et seq. to recover damages for the death of her intestate on December 25, 1938, resulting from the negligence of the defendant carrier, while the deceased was engaged in the course of his employment as a brakeman in interstate commerce.

At about 5:50 o'clock on the morning of December 25, 1938, the deceased and the other members of the defendant's freight train crew were handling a switching operation of freight cars on a storage or pass track just east of and parallel to the northbound main line track of the defendant's railroad at Hurt, Virginia. "It was still quite dark (R.20). The tracks at this point ran generally north and south, and the pass track was several hundred yards in length. At the north end of the pass track there was located a switch into the northbound main line and about three or four car lengths south of this switch was a derailing device or switch (R.22). This derailer was situated on the east rail of the pass track, and was designed to be used to prevent cars on the pass track from rolling out on the main line, the grade being slightly downhill from south to north. The derailer was constructed for manual operation (R.24-25) and contained a target device as a danger signal for daylight purposes (R.28-29) and a place for a light as a signal at night (R.15,25), but there was no light on the derailer at this time (R.25,59), although one has been placed on it since then, (R.25,28-29). The rule book issued for guidance of the defendant's crews indicated that lights were required on derailleurs (R.90). There is plenary evidence in the record that the west rail of the pass track opposite the derailer on the east rail was defective, thin and badly worn (R.16,30), that the rail was 26 or 27 years old (R.34), and that there was little ballast under and around the cross ties, some of which were old and in poor condition and sloped to the west (R.31). There was also evidence that the derailer itself was shaky and loose (R.15)."

When the train arrived at Hurt, Virginia, from Spencer, North Carolina, it travelled beyond the switch at the north end of the pass track and then backed into this siding to allow another northbound train to pass, the conductor first opening the switch and the derailler (R.75). The deceased closed the switch and derailler and the freight train remained in the pass track while the other northbound train passed (R.20-21, 24-25). Then the deceased opened the switch and derailler and the train pulled back on the main line north of the pass track, immediately backed completely south of the switch, and the deceased cut the train so as to leave four empty cars attached to the back of the engine. The locomotive and these four cars then pulled north past the switch, the deceased opened the main line switch, stepped up on the southeast corner of the lead car, a gondola, and signalled the engineer to back into the pass track where they were to pick up twelve other cars which were already standing in the southern portion of the pass track when the train arrived at Hurt (R.20-21). The lead car upon which the plaintiff's intestate was then standing struck the north or "wrong" end of the derailler which was later found to be set on the east rail (R.23), causing the lead truck of the car to derail. Mr. Brady was thrown under the wheels and instantly killed (R.22).

The record is silent as to who closed the derailler after the deceased opened it to allow the train to pass back out on the main line, nor did any witness testify as to who closed the switch so as to allow the train to back south on the main line prior to cutting the train. However, the evidence is clear and uncontradicted that on this movement north out of the pass track the deceased was on one of the four cars just behind the engine (R.25,75). The defendant contended that when the train was first backed into the side track the conductor and flagman (Brandt and Scruggs) left the caboose to cover a road crossing and release the brakes of the twelve cars to be picked up from the storage track, while the plaintiff contended that at least one of them stayed on the caboose (36 or 37 cars behind the locomotive) at the back (south end) of the train where the main line switch had to be closed before

the train backed south to the place where it was cut between the fourth and fifth cars by the deceased. The testimony of the conductor, Brandt, was not unequivocal on this point (R.75).

There was no evidence that the deceased was familiar with the tracks and switches at Hurt, Virginia. He was a part time extra trainman (R.14,95). On the occasion of the derailment it was dark and no opportunity existed for the deceased to inspect the rails and track bed.

In the trial below the plaintiff contended that the conductor or flagman, without notice to the deceased, negligently reset the derailer after the deceased opened it to allow the train to proceed out of the pass track; that the defendant negligently failed to equip the derailer with a warning light; and that the derailer and adjacent west rail and roadbed were in a defective condition so that a derailment occurred which would not have happened had the track been in good condition (R.116-119). On the other hand, the defendant contended that the track and derailer were in proper condition and that the deceased himself set the derailer and thereafter failed to open it (R.123). Upon issues of negligence, assumption of risk, contributory negligence and damages (R.9) the case was submitted to the jury, who found all issues in favor of the plaintiff and awarded a total recovery of \$20,000.00.

The defendant carrier took an appeal to the Supreme Court of the State of North Carolina where the judgment of the trial court was reversed (R. supplement 11), thereby resulting in dismissal of plaintiff's case.

PART II. JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Judicial Code, Section 237 (b), amended, 28USCA Sec. 344, to have determined the petitioner's right specially set up and claimed

under a statute of the United States: the Federal Employers' Liability Act, 45 USCA Sec. 51, et seq., providing for the recovery of damages by the personal representative of a person suffering death while employed by a railroad common carrier and engaged in interstate commerce, when such death results in whole or in part from the negligence of such carrier or its agents. The date of the judgment sought to be reviewed is December 16, 1942, and it was rendered by the Supreme Court of the State of North Carolina, the state court of last resort. The date when this petition is filed is March 15, 1943.

Since the petitioner's right to recover damages is founded upon a statute of the United States and the ruling of the Supreme Court of the State of North Carolina amounts in substance to a denial of such right, this Court should review and reverse the decision of the court below. *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 79 L. ed. 885, 55 S. Ct. 407; *Norris v. Alabama*, 294 U.S. 587, 79 L. ed. 1074, 55 S. Ct. 579; *Great Northern R. Co. v. Washington*, 300 U.S. 154, 81 L. ed. 573, 57 S. Ct. 397; *Tiller v. Atlantic Coast Line R. Co.*, U.S., 87 L. ed. (Advance Opinions) 446, S. Ct. (decided Feb. 1, 1943).

It is contended that the questions involved in this case and presented by this petition are substantial because of the importance of the effect and scope of the North Carolina court's interpretation of the Federal Employers' Liability Act and the 1939 Amendment thereto (August 11, 1939) 53 Stat. 1404, c. 685, 45 USCA Sec. 54. In this case the North Carolina court has held that as a matter of law (a) there was insufficient evidence of the defendant's negligence being a proximate cause to be submitted to the jury; (b) the negligence of the deceased was the sole proximate cause; (c) the negligence of the deceased resulted in his conclusive assumption of the risk of being killed. The evidence on all of these grounds for the state court decision was highly conflicting and the jury found for the plaintiff on all points. In applying the Act to the facts of this case the state court failed to follow the weight of authority and the decisions of this Court which hold that

proximate cause should be left to the jury's determination. *Louisville and Nashville R. Co. v. Layton*, 243 U.S. 617, 61 L. ed. 931, 37 S. Ct. 456; *Tiller v. Atlantic Coast Line R. Co.*, *supra*; *Crain v. Illinois Central R. Co.* (Mo., 1934) 73 S.W. (2d) 786, *cert. den.*, 293 U.S. 607, 79 L. ed. 698. In the guise of sole negligence of or conclusive assumption of risk by the deceased the North Carolina court has in substance ruled as a matter of law that the conduct of the deceased was such contributory negligence as to bar a recovery by his personal representative and refused altogether to consider the 1939 Amendment as applicable. It is the emphatic contention of the petitioner that this narrow and constrictive interpretation emasculates the Act and the 1939 Amendment and is directly opposed to the legislative intent of Congress as liberally articulated in the opinions of this Court. *Lilly v. Grand Trunk Western R. Co.*, U.S., 87 L. ed. (Advance Opinions) 323, S. Ct.; *Tiller v. Atlantic Coast Line R. Co.*, *supra*. The North Carolina court has obviously applied the narrow state law rule and ignored the Federal decisions which are controlling in the trial of cases under the Federal Employers' Liability Act. *Baltimore and Ohio R. Co. v. Kepner*, 314 U.S. 44, 86 L. ed. 28, 62 S. Ct. 6.

In the trial court the federal questions sought to be reviewed in this Court were raised originally by the pleadings (R.3,5) and were supported by the evidence and admissions of the defendant (R.12-14). The federal questions were all decided in the petitioner's favor in the trial court by the verdict of the jury and judgment of the court (R.9-10). The trial judge overruled the defendant's motions for dismissal as of nonsuit (R.53, 103), and submitted the case under full instructions relating to the applicability of the Federal Employers' Liability Act (R.107-109, 125-130, 133-137). In the Supreme Court of the State of North Carolina these questions were raised by the defendant's ten assignments of error (R.143-150), the defendant placing chief reliance upon its seventh assignment of error to the refusal of the trial court to allow its motion for judgment of nonsuit (R.148). It was upon this assignment of error that the North Carolina appellate

court reversed the judgment and directed a dismissal of the case (R. supplement 1-10).

PART III. QUESTIONS PRESENTED.

(1) Did the Supreme Court of the State of North Carolina err in holding as a matter of law that there was no evidence, sufficient to support the jury's verdict, of the defendant's negligence being a proximate cause of the occurrence which resulted in the death of petitioner's intestate?

(2) Did the court below err in ruling as a matter of law that the actions of the deceased were such negligence on his part as to constitute the sole proximate cause of his death, and that his conduct was such as to compel a conclusive presumption that he assumed the risk of being killed, so as to bar recovery?

(3) Was it error for the court below to hold that the 1939 Amendment to the Act was inapplicable?

PART IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The reasons why the petitioner contends that the writ should be granted in this case are partially stated in the last two paragraphs of Part II of this petition. The exact reasons upon which the petitioner relies may be summarized as follows:

(1) The Supreme Court of the State of North Carolina has usurped the province of the jury, contrary to the spirit and purpose of the Act under which the petitioner asserts her right. Upon controversial evidence from which reasonable, fair-minded men might draw different inferences the issue of the defendant's negligence was properly left to the jury to decide, and the appellate court below had no authority to redraw the inferences, substituting its interpretation of the facts.

for that of the jury. *Jones v. East Tennessee, V. and G. R. Co.*, 128 U.S. 443, 445, 32 L. ed. 478, 479, cited with approval in *Tiller v. Atlantic Coast Line R. Co.*, *supra*. Indeed, it is submitted that the preponderance of the evidence supports the conclusion of the jury rather than that of the North Carolina court. In its opinion the court below said that striking a derailer from the wrong direction was so unusual, and so contrary to the purposes for which the derailer was used, the railroad company was not under a duty to foresee an occurrence such as the one in this case; that, therefore, it was not actionable negligence for the defendant to use an opposite rail which was worn (R. supplement 6-8). Yet the record discloses that the defendant's own division superintendent had seen twenty-five to fifty such occurrences, about half of which resulted in derailments (R.65).

(2) The decision of the court below found as a matter of law that the deceased set the derailer back on the east rail, or that he neglected to open it before signalling the engineer to proceed with the backing of the four cars into the pass track (R. supplement 4, 9). Not a witness testified that the deceased set the derailer, but on the contrary the circumstantial evidence regarding this matter impels the conclusion that it was probably set by that one of the train crew (other than the deceased, because he was at all times on one of the four cars next to the engine) who closed the switch so that the entire train could be backed up south on the main line for the cut off of the four cars and locomotive. The statement in the court's opinion that the deceased "closed the switch for the movement of the train south on the main line" (R. supplement 4) is totally lacking in evidence to support it. Not a witness so testified. This person was at the back of the train, 32 or 33 cars behind the ones upon which the deceased was located at all times. There is no evidence that the deceased had any notice of the fact that the derailer had been reset after he opened it, and since it was not equipped with a light he could not see it in the dark. He had no opportunity to inspect it or the adjacent track and roadbed. Even conceding that the deceased should have first ascertained whether the derailer had

been reset after he opened it, at most his conduct would have amounted only to contributory negligence which would have diminished but not barred recovery. Federal Employers' Liability Act, 45 USCA Sec. 53. The court below characterized as assumption of risk what was in substance its finding of fact with regard to the deceased's conduct, and this tortuous construction of Sec. 54 should be stricken down by this Court.

(3) It is the contention of the petitioner that the 1939 Amendment to the Federal Employers' Liability Act, *supra*, was intended to require that all cases thereafter "tried under the Federal Act be handled as though no doctrine of assumption of risk had ever existed." *Tiller v. Atlantic Coast Line R. Co.*, *supra*, at p. 452 of the L. ed. Advance Opinions. It is submitted that the Amendment was designed to have retroactive effect and remove the defense of assumption of risk from all cases, irrespective of when the injury or death of the employee occurred. Of course, this question does not appear from the record to have been raised by the petitioner in the trial court, but it did not become material to this case until the decision of the appellate court below was rendered. The petitioner has waived no rights and is not estopped to insist now that the Supreme Court of the State of North Carolina erred in basing its decision, in part at least, upon an incorrect interpretation of the 1939 Amendment. The petitioner has no quarrel with the result in the trial court, because the error against her in submitting the question of assumption of risk was rectified by the jury's verdict. *Lilly v. Grand Trunk Western R. Co.*, *supra*. The tenor of the ~~entire~~ opinion of the North Carolina court indicates that its basic reason for upsetting the jury's verdict was its conclusion from the evidence that the deceased assumed the risk (meaning he was guilty of contributory negligence), because he either set the derailler or failed to take heed that it had been set by another. This ruling conflicts with the opinions of this Court cited above.

WHEREFORE, because the decision and judgment of the Supreme Court of the State of North Carolina decided the foregoing propositions contrary to the general Federal law

and the decisions of this Court, and erroneously interpreted and applied the Federal Employers' Liability Act, Amended, so as to substantially deny to the petitioner the right which she asserts thereunder, your petitioner, upon this petition, the annexed brief, and the certified record as printed for the court below, together with the printed proceedings and opinion of the Supreme Court of the State of North Carolina, prays that a writ of certiorari be issued, to the end that this cause may be reviewed and determined by this Court, and that upon such review the judgment of the Supreme Court of the State of North Carolina be reversed and that of the trial court affirmed.

IRENE BRADY, Administratrix of
the Estate of Earle A. Brady,
Deceased,

Petitioner.

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Counsel for Petitioner.

C. CLIFFORD FRAZIER,
D. E. HUDGINS,
WELCH JORDAN,
Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No.

IRENE BRADY, ADMINISTRATRIX OF THE
ESTATE OF EARLE A. BRADY, DECEASED,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

I. OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of North Carolina is reported in 222 N. C. 367, 23 S. E. (2d) 334. The opinion is also appended to the record filed with this Court (R. supplement 1, *et seq.*).

II. JURISDICTION.

The jurisdiction of this Court is invoked under Judicial Code, Section 237 (b), Amended, 28 USCA Sec. 344, to have determined the petitioner's right specially set up and claimed under the Federal Employers' Liability Act, Amended, 45 USCA Sec. 51, *et seq.*, a statute of the United States.

III. STATEMENT OF CASE.

The petition to which this brief is annexed contains a concise statement of the relevant facts, and they will not be repeated in this brief except where necessary to consideration of the questions presented and discussed.

IV. ARGUMENT.

Summary.

The decision of the court below should be reviewed and reversed because (1) it applies a test of the sufficiency of the evidence of the defendant's negligence to go to the jury which conflicts with the general Federal law and the decisions of this Court, in effect substituting the verdict of the court for that of the jury; (2) it holds as a matter of law that acts of the deceased constituted the sole proximate cause of his death and that he should be conclusively deemed to have assumed the risk caused by his own alleged negligence, notwithstanding that the evidence was conflicting and at most would have justified simply a finding of contributory negligence; and (3) it fails to apply properly the 1939 Amendment to the Federal Employers' Liability Act (August 11, 1939) 53 Stat. 1404, c. 685, 45 USCA Sec. 54, so as to eliminate from the case all consideration of the repudiated doctrine of assumption of risk in all its forms, but on the contrary relies on assumption of risk to bar recovery.

(1) *The Evidence of Defendant's Actionable Negligence Was Ample and the Jury's Findings Thereon Should Have Remained Undisturbed.*

The plaintiff introduced the evidence of several witnesses who testified that the rail immediately opposite the derailler was an ancient one and in a defective condition (R. 16, 30, 34). It was 24 years old when taken out of the defendant's main line track in 1936 and installed at Hurt, Virginia (R.62), and the underlying roadbed was in bad condition (R.31). The derailler itself was not equipped with a signal light, although designed for one (R. 15, 25, 59). The plaintiff introduced the evidence of two expert witnesses who testified in response to properly framed hypothetical questions that in their opinion, based upon many years of railroading experience and also observation of similar occurrences, the derailment which resulted in the death of plaintiff's intestate was caused by the defective rail opposite the rail upon which the derailler was set: that the derailment would not have occurred if the west

rail had not been defective (R.37-38, 39, 45, 46). The derailer had a groove on the north or "wrong" end which would have carried the wheel on over and back on the east rail if the west rail had not been defective (R. 41-42, 46). This evidence was unquestionably competent and admissible, *McGraw v. Southern R. Co.*, 206 N. C. 873, 175 S. E. 286; 209 N. C. 432, 184 S. E. 31, and was adequate to take the case to the jury. When the court below held otherwise and reversed the trial court, the decision was contrary to the general Federal law and the decisions of this Court. *Tiller v. Atlantic Coast Line R. Co.*, U.S., 87 L. Ed. (Advance Opinions) 446, S. Ct.; *Davis v. Wolfe*, 263 U.S. 239, 68 L. Ed. 284, 44 S. Ct. 64; *Cooley v. New York Central R. Co.* (C.C.A., N.Y. 1936), 80 F. (2d) 816, cert. den. 297 U.S. 721, 80 L. Ed. 1005, 56 S. Ct. 599; *Young v. Wheelock*, 333 Mo. 992, 64 S.W. (2d) 950, cert. den. 291 U.S. 676, 78 L. Ed. 1064.

The holding in the opinion of the court below that the consequences which might follow from a car being backed over the "wrong" end of a derailer set opposite a defective rail could not reasonably be foreseen by the defendant is directly opposed to the evidence. The defendant's superintendent had seen twenty-five to fifty instances of cars backed over the wrong end of derailers (R.65).

It is submitted that the Supreme Court of the State of North Carolina has, in this instance, wholly failed to follow the controlling principles of law applicable to this type of case in measuring the sufficiency of the evidence of defendant's actionable negligence.

- (2) *It Was Error to Hold as a Matter of Law That the Deceased Was Guilty of Negligence Which Was the Sole Proximate Cause of His Death and Which Gives Rise to a Conclusive Presumption That He Assumed the Risk of Injury.*

The lips of the deceased were sealed forever when this tragedy occurred, and he cannot relate what he did prior to the derailment. However, no witness came forward and said that the deceased reset the derailer on the east rail of the pass track after he opened it and the main line switch to enable

the entire train to re-enter the main line. The evidence tends to point to another member of the train crew (R.75). It is conceded that the evidence is circumstantial, but it is certainly susceptible of more than one reasonable inference. *Cooley v. New York Central R. Co., supra*. Therefore, the matter was properly referred to the jury, and the court below erred in assuming to invade this exclusive province of the jury. It was for the twelve to say whether the deceased by his own act or omission caused his death. *Tiller v. Atlantic Coast Line R. Co., supra*.

In effect the Supreme Court of the State of North Carolina has mislabeled what it conceived to be the actions of the deceased. He could not have assumed the risk when there was none without an overt act of commission or omission on his part. The court below ran afoul of what this Court describes in the *Tiller case, supra*, as "the great uncertainty existing prior to the Act [1939 Amendment abolishing assumption of risk] as to what the margin between these doctrines [contributory negligence and assumption of risk] was . . ." Contributory negligence would not have prevented recovery by the plaintiff, Sec. 53 of the Act; nor should recovery be denied through the simple expedient of giving it another name: assumption of risk.

The same criticism of the decision below which was made on the question of the defendant's negligence is applicable on the issue of the alleged negligence of the deceased—it was a disputed question of fact and the jury resolved it in favor of the plaintiff. This result should not have been disturbed.

(3) *The Amendment of 1939 Was Intended To Be Retroactive and the Court Below Should Have Given It This Application.*

The 1939 Amendment to the Act under which this suit was brought inserted the language which is in italics in the following quotation of Sec. 54 of the Act:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of

its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

When Congress enacted this revision of the law, no saving or exclusion clause with reference to pending claims or litigation was included, nor did the amendment specify that it was to become operative at some future date or with respect only to a particular class of such cases. The Amendment was manifestly intended to clarify the existing section of the statute and give it a meaning consistent with the beneficial purposes which the Act was designed to achieve. Judicial construction of the original Sec. 54 had produced results not contemplated when the statute was first enacted. *Tiller v. Atlantic Coast Line R. Co., supra.*

In the decision of the North Carolina court the term assumption of risk is actually used to denote a means of appraising the defendant's negligence (as well as the alleged contributory negligence of the deceased). This analysis is suggested by the *Tiller case, supra.* Since this is true, if the 1939 Amendment to the Act completely eliminated the concept of assumption of risk, irrespective of the date when the accident may have occurred, this Court should review this case in order to weigh the defendant's negligence on a scales not affected by the weight of a discarded doctrine. Furthermore, the court below specifically ruled that the 1939 Amendment was inapplicable (R. supplement 9) to this case, and the petitioner contends that this holding runs counter to the express intent of Congress.

The 1939 Amendment abolished the defense of assumption of risk. In other words, from the moment it became law railroad carriers sued under the Act were deprived of the right to plead and rely upon this defense which was formerly available to them. Congress evidently intended to ameliorate im-

mediately the morally unacceptable proposition that a man compelled by economic circumstances to follow a hazardous employment did so with full knowledge and hence had to bear the consequences attendant upon the risks. *Tiller v. Atlantic Coast Line R. Co.*, *supra*, footnotes 20-22, inclusive. To give the Amendment the retroactive application which is suggested would deprive the defendant of no right in this case. The petitioner contends that the defendant's negligence should be ascertained solely from the evidence relating to its failure to keep and maintain its equipment in proper condition, and if such dereliction of duty be found (as it was by the jury), then the defendant should not escape its responsibility to the family of the deceased by interposing a defense abolished fifteen days after this suit was instituted and long before the case was tried, or decided by the state appellate court. It is submitted that the 1939 Amendment automatically removed this defence from all cases not previously adjudicated.

Conclusion.

For the reasons set forth in the petition for writ of certiorari and in this brief, and in order that the petitioner may not be deprived of her right under the United States statute, it is respectfully submitted that the supervisory powers of this Court should be exercised to correct the erroneously grounded decision of the Supreme Court of the State of North Carolina; that a writ of certiorari should be granted; and that thereafter the case should be considered and the judgment and decision of the North Carolina court reversed and the judgment of the trial court affirmed.

Respectfully submitted,

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Of Counsel.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1942

No. 830.

23

**IRENE BRADY, Administratrix of the Estate of
EARLE A. BRADY, Deceased,
Petitioner,**

VERSUS

SOUTHERN RAILWAY COMPANY,

Respondent

BRIEF IN REPLY TO RESPONDENT'S BRIEF

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IN THE
Supreme Court of The United States

OCTOBER TERM, 1942

No. 830

IRENE BRADY, ADMINISTRATRIX OF THE
ESTATE OF EARLE A. BRADY, DECEASED,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF IN REPLY TO RESPONDENT'S BRIEF

**I. RESPONDENT'S OBJECTIONS TO CERTIORARI
JURISDICTION ARE UNTENABLE.**

(1.) The respondent's contention that this Court has no certiorari jurisdiction of the question which petitioner raises under the 1939 Amendment to the Federal Employers' Liability Act, 53 Stat. 1404, c. 685, 45 USCA Sec. 54, is unsound for the following reasons:

(a.) Since petitioner seeks the writ only for the purpose of obtaining a review of the decision of the Supreme Court of the State of North Carolina, the respondent may not raise, and attempt to rely upon, occurrences in the progress of the trial in the trial court which were not presented, either directly or indirectly, by the record in the appellate court below. *Davis v. Packard*, 7 Pet. 276, 8 L. ed. 684; *Storm v. United States*, 94 U.S. 76, 24 L. ed. 42; *Clark v. Pennsylvania*, 128 U.S. 395, 32 L. ed. 487, 9 S. Ct. 113. This record is all that is before this Court and it wholly fails to reveal any waiver of the petitioner's right to contend that the 1939 Amendment protects her against the application of the doctrine of assumption of risk, employed by the appellate court below to sustain its decision against petitioner. The record here is silent as to petitioner's position in the trial court.

(b.) It cannot be said that petitioner waived her rights under the 1939 Amendment by failing to contest the submission to the jury of an issue on assumption of risk, because the jury answered the issue in favor of petitioner upon her contention that the evidence would not justify a finding that her intestate assumed the risk of injury and death.

(c.) Manifestly, the petitioner was not required to jeopardize her case in the trial court by objecting to an issue dependent upon the applicability of a Federal statute when the point had not been decided by this Court, if she were willing to run the risk of an adverse answer by the jury. Petitioner, having taken this chance successfully, is not estopped now to assert her rights under the Amendment when the appellate court below holds for the *first time* in the history of this litigation that as a matter of law petitioner's intestate must "be conclusively deemed to have assumed the risk of an injury" (R. Supplement 9).

(d.) The retroactivity of the 1939 Amendment was not drawn in issue until the North Carolina Supreme Court based its decision upon the doctrine of assumption of risk—the question became germane only when the appellate court below held the 1939 Amendment to be inapplicable in this case; it is now raised for the first time, and unquestionably this Court has authority to consider this vital matter. *Hormel v. Helvering*, 312 U.S. 552, 85 L. ed. 1037, 61 S. Ct. 719. The question is obviously one of first importance and the decision of the court below upon this essential phase of the case is contrary to the principles announced in the two most recent decisions of this Court. *Tiller v. Atlantic Coast Line R. Co.* U.S., 87 L. ed. (Advance Opinions) 446, 63 S. Ct. 444; *Lilly v. Grand Trunk Western R. Co.*, U.S., 87 L. ed. (Advance Opinions) 323, 63 S. Ct. 347.

(e.) In any event the petitioner could not waive her present contention that the 1939 Amendment is retrospective, because this is a substantive right conferred by a public

policy statute. *Tiller v. Atlantic Coast Line R. Co.*, *supra*. The interest of the public at large precludes the waiver of this important question which was specifically reserved in the *Lilly case*, *supra*.

(2.) It is significant to observe that the respondent in its brief (p. 5) admits that this Court possesses jurisdiction to hear this case upon the substantive issues of whether the court below erred in holding that petitioner could not recover (a) because there was no evidence of negligence on the part of respondent, and (b) because the evidence conclusively showed that her intestate died as a result of his own negligence which amounted to his conclusive assumption of the risk. But the respondent dismisses this right of the petitioner with the categorical statement that no special or important questions are presented. The petitioner respectfully submits that the court below committed manifest and palpable error in this case in its misinterpretation of the vital general principles of law arising under the Federal Employers' Liability Act. The decision of the North Carolina court collides head on with the liberal rule adopted by this Court in the *Tiller case*, *supra*, where it is said:

"No case is to be withheld from a jury on any theory of assumption of risk and questions of negligence should under proper charge from the court be submitted to the jury for their determination." (Italics supplied.)

II. RESPONDENT'S STATEMENT OF FACTS IS MISLEADING.

The petitioner does not suggest that respondent has intentionally misstated any portion of the facts or that it has drawn unfair or unwarranted inferences. However, the respondent has followed the court below in stating as ultimate facts certain inferences of fact which may or may not be drawn from the evidence—inferences which only the jury were competent to make. We point out below the more important and glaring imperfections which appear in the re-

respondent's version of the facts as set out in its brief (pp. 6-16, inclusive) :

(a.) The only evidence relating to Brady's familiarity with the tracks and switches at Hurt, Virginia, was that "he had frequently made previous runs as brakeman to Monroe, Virginia, on both freight and passenger trains" (R. 18) from Spencer, North Carolina, and return; that he worked for respondent only occasionally during 1938 (R. 95); and that Hurt, Virginia, lies between the two places. From this evidence the petitioner contended, and the jury apparently found, that Brady did not possess knowledge of the track conditions which would render his conduct negligent. It is beyond the province of the respondent, as it was beyond that of the court below, to undertake to supplant the inference of the jury.

(b.) Respondent says "that there has been no change . . . of the . . . derailer . . . since the accident" (p. 10 of its brief), yet the evidence was that a light was placed on the derailer after petitioner's intestate was killed (R. 25, 28-29).

(c.) The respondent's brief (p. 16) unequivocally states that "there was no evidence that any of the rails . . . or the roadbed were in any way deficient, defective . . . no evidence that the running of a car over the so-called 'wrong end' of the derailer was either normal or foreseeable." Yet the record contains the testimony of several witnesses who described the worn and defective condition of the west rail (R. 16, 30, 34) and that the roadbed was in poor condition (R. 31). Respondent's own executive official testified that he had seen perhaps as many as fifty instances of cars backed over the "wrong end" of derailleurs (R. 65). Again the respondent has fallen into the same error as the court below—drawn an inference which was properly left to the jury upon conflicting evidence. Unquestionably, therefore, where switching operations were in progress in the dark it was for the jury—and not the respondent or the court below—to determine whether respondent should have foreseen that the defective condition of the tracks might have caused the derailment.

(d.) The respondent says in its brief that "the inevitable conclusion is that Brady put the derailer on the rail when the train came out of the storage track" (pp. 14, 15), but the testimony of the witnesses was that Brady was on the fourth car from the engine, over thirty cars from the caboose, when the train pulled out of the storage track. The engineer said "He (Brady) set the derailer not to derail and opened the switch for me to come out and I came on out. Then I pulled out and backed down south on the northbound track beyond the crossing. *Mr. Brady was on the four cars and I saw him get off these four cars.* He rode back north on these four cars" (R. 25). The conductor testified: "I rode the caboose car back. When they came on down I stayed on the caboose car and Mr. Brady stayed where the four or five cars were. He cut those out." (R. 75). Yet in respondent's brief it is asserted that the conductor was at a highway crossing an eighth of a mile away and "remained there until the train came out of the storage track and backed down the main track again on its third movement" (p. 13). A careful scrutiny of the conductor's testimony again indicates that more than one inference can reasonably be drawn concerning his conduct. The jury *could* have made the inference which the respondent and the court below drew, but the jury exercised its privilege of reaching the equally as logical conclusion that Brady could not have reset the derailer because he was in no position to do so, while the conductor did set it because he was at the rear of the train when the switch was closed to permit the train to back up south on the main line before the four cars were cut off.

There are numerous other instances in respondent's brief where one of two conflicting inferences have been stated as ultimate facts, and petitioner has called to the attention of this Court only a few flagrant examples. The petitioner respectfully submits that the vice in respondent's references to the facts of this case is the same erroneous approach to the evidence which caused the court below to make a decision inconsistent with the principles cited in the petitioner's brief

in support of her petition for a writ of certiorari. The divergent evidence was properly submitted to the jury in the trial court and its verdict should not have been disturbed.

III. RESPONDENT'S ARGUMENT IS UNSUPPORTED BY THE EVIDENCE AND THE DECISIONS OF THIS COURT.

The petitioner again invites the attention of this Court to the discussion of the evidence contained in both the preceding part of this brief and in the petition for a writ of certiorari and supporting brief already filed with the Court.

In respondent's brief it repeats the assault which it made in the court below upon the testimony of Heritage and Holden, two of petitioner's witnesses. It is submitted that when the evidence adduced from these witnesses is considered in its entirety (R. 34-53) it was properly admitted by the trial court. The witnesses were qualified as experts and in response to adequately framed hypothetical questions expressed opinions as to the causes of the derailment. The testimony of these witnesses was undoubtedly admissible under the North Carolina cases, and no more constituted speculation and conjecture than did the evidence of the witnesses in *McGraw v. Southern R. Co.*, 206 N.C. 873, 175 S.E. 286; 209 N.C. 432, 184 S.E. 31, *cert. den.* 299 U.S. 591, 81 L. ed. 435, 57 S. Ct. 117. Such testimony is valuable probative evidence. *Britt v. Carolina Northern R. Co.*, 148 N.C. 37, 61 S.E. 601.

The court below held that the respondent owed no duty to petitioner's intestate (R. Supplement 7-8), and hence was not negligent in failing to foresee that a derailment might occur which would kill its employee. This cannot be reconciled with the rationale of this Court's decision in *Tiller v. Atlantic Coast Line R. Co.*, *supra*.

Necessary limitations upon the scope of this reply brief preclude a detailed response to the several other arguments advanced by respondent in its brief. Some of these arguments

are met by the petition for the writ and supporting brief, but all of the respondent's points lose their effectiveness when confronted by the sound and liberal principles enunciated in this Court's decision in the *Tiller case*, *supra*. In the final analysis the petitioner contends that upon conflicting evidence, ample to sustain the jury's verdict in favor of petitioner, the case was properly submitted to the jury and they reached a result supported by inferences which could reasonably be deduced from the evidence. Upon appeal the court below upset the jury's verdict and in support of its decision undertook to redraw a different (and perhaps just as reasonable) set of inferences. This action of the Supreme Court of the State of North Carolina prevented petitioner from having the compensation assured her by the Federal Employers' Liability Act. It is submitted that this Court should review this case and rectify the mistake made by the court below in holding that there was no evidence of respondent's negligence and that petitioner's intestate conclusively assumed the risk of being killed.

Respectfully submitted,

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CHARLES ELMORE SIMPSON
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1943

No. 26

IRENE BRADY, Administratrix of the Estate of
EARLE A. BRADY, Deceased,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF OF PETITIONER

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA**

✓ **JULIUS C. SMITH,**
✓ **D. E. HUDGINS,**
✓ **WELCH JORDAN,**
Counsel For Petitioner.

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IN THE
Supreme Court of The United States

OCTOBER TERM, 1943

No. 26

IRENE BRADY, ADMINISTRATRIX OF THE
ESTATE OF EARLE A. BRADY, DECEASED,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF OF PETITIONER

I. OPINION OF THE COURT BELOW

No opinion was written, delivered or filed in connection with the trial of the case in the Superior Court of Guilford County, North Carolina. The opinion of the Supreme Court of the State of North Carolina is reported in 222 N.C. 367, 23 S.E. (2d) 334, and is printed as a part of the record filed in this Court (R. 124-133):

II. JURISDICTION

The jurisdiction of this Court is invoked under Judicial Code, Section 237 (b), Amended, 28 USCA Sec. 344, for the purpose of having determined the petitioner's rights asserted and claimed under the Federal Employers' Liability Act, Amended, 45 USCA Sec. 51, *et seq.*, a statute of the United States.

III. STATEMENT OF CASE

(1) Procedural History of the Case

On July 26, 1939, the petitioner brought this action in the state court of North Carolina under the Federal Employers' Liability Act, 45 USCA Sec. 51; *et seq.* to recover damages for the death of her intestate on December 25, 1938, resulting from the negligence of the defendant carrier, while the deceased was engaged in the course of his employment as a brakeman in interstate commerce. The suit was tried at the March 30, 1942, civil term of Guilford County Superior Court before a judge and jury. Upon issues of negligence, assumption of risk, contributory negligence and damages (R.8) the case was submitted to the jury, who found all issues in favor of the plaintiff and awarded a total recovery of \$20,000.00. After the entry of a judgment upon this verdict the defendant railroad appealed to the Supreme Court of the State of North Carolina where, on December 16, 1942, the judgment of the trial court was reversed (R. 133-134), thereby resulting in dismissal of plaintiff's case. On March 15, 1943, a petition for a writ of certiorari to the Supreme Court of the State of North Carolina was filed in this Court, and on May 3, 1943, the petition for certiorari was granted (R. 143).

(2) Statement of the Facts

At about 5:50 o'clock on the morning of December 25, 1938, the deceased and the other members of the defendant's freight train crew were handling a switching operation of freight cars on a storage or pass track just east of and parallel to the northbound main line track of the defendant's railroad at Hurt, Virginia. It was still dark (R. 17). The tracks at this point ran generally north and south, and the pass track was several hundred yards in length. At the north end of the pass track there was located a switch into the northbound main line and about three or four car lengths south of this switch was a derailing device. (R. 18). This derailer was situated on the east rail of the pass track, and was designed to prevent cars on the pass track from rolling out on the main

line, the grade being slightly downhill from south to north. The derailer was constructed for manual operation (R. 21) and contained a target device as a danger signal for daylight purposes (R. 23) and a place for a light as a signal at night, but there was no light on the derailer at this time (R. 21), although one has been placed on it since then (R. 21, 24). The rule book issued for guidance of the defendant's crews indicated that lights were required on derailleurs (R. 75). There is plenary evidence in the record that the west rail of the pass track opposite the derailer on the east rail was defective, thin and badly worn (R. 13, 25-26), that the rail was 26 or 27 years old (R. 28), and that there was little ballast under and around the cross ties, some of which were old and in poor condition and sloped to the west (R. 26). There was also evidence that the derailer itself was shaky and loose (R. 13).

When the freight train arrived at Hurt, Virginia, from Spencer, North Carolina, it travelled beyond the switch at the north end of the pass track and then backed into this siding to allow another northbound train to pass, the conductor first opening the switch and the derailer (R. 63). The deceased closed the switch and set the derailer, and the freight train remained in the pass track while the other northbound train passed (R. 21). Then the deceased opened the switch and derailer and the train pulled back on the main line north of the pass track, thereafter backed completely south of the switch, and the deceased cut the train so as to leave four empty cars attached to the back of the engine (R. 21). The locomotive and these four cars then pulled north past the switch, the deceased opened the main line switch, stepped up on the southeast corner of the lead car, a gondola, and signalled the engineer to back into the pass track where they were to pick up twelve other cars which were already standing in the southern portion of the pass track when the train arrived at Hurt (R. 18, 21). The lead car upon which the plaintiff's intestate was then standing struck the north or "wrong" end of the derailer which was later found to be set on the east rail (R. 19), causing the lead truck of the car to derail. Brady was

thrown under the wheels and instantly killed (R. 18-19).

The record contains no direct testimony as to the identity of the person who closed the derailer after the deceased opened it to allow the train to return to the main line, nor did any witness testify as to who lined the switch so as to allow the train to back up south on the main line prior to cutting the train. However, the evidence is clear and uncontradicted that on this movement north out of the pass track and then back down the main line to the place where Brady cut the train the deceased was on one of the four cars just behind the engine (R. 21, 63). The defendant contended that when the train was first backed into the side track the conductor and flagman (Brandt and Scruggs) left the cabooses to cover a road crossing and release the brakes of the twelve cars to be picked up from the storage track, while the plaintiff contended that at least one of them stayed on the caboose (36 or 37 cars behind the locomotive) at the back (south end) of the train where the main line switch had to be closed before the train could be backed south after coming out of the pass track. The testimony of the conductor, Brandt, was not unequivocal on this point (R. 63). The plaintiff contended that her intestate could not have, and did not, reset the derailer; that this was done by the trainman who lined the main switch for the backing movement down the main line.

There was no evidence that the deceased was familiar with the tracks and switches at Hurt, Virginia. He was a part-time extra trainman (R. 12, 79-80). On the occasion of the derailment it was dark and no opportunity existed for the deceased to inspect the rails and track bed.

In the trial below the plaintiff contended that the conductor or flagman, without notice to the deceased, negligently reset the derailer after the deceased opened it to allow the train to proceed out of the pass track; that the defendant negligently failed to equip the derailer with a warning light; and that the derailer and adjacent west rail and roadbed were in a defective condition so that a derailment occurred which

would not have happened had the track been in good condition (R. 97-100). On the other hand, the defendant contended that the track and derailer were in proper condition and that the deceased himself set the derailer and thereafter failed to open it (R. 100-103).

(3) Summary Analysis of Opinion of Court Below

A careful examination of the opinion of the North Carolina Supreme Court (R. 124-133) discloses that the decision denying recovery to the plaintiff was based upon three distinct grounds: (a) that under the evidence appearing in the record the defendant was, as a matter of law, guilty of no negligence, since it owed no duty, under the prevailing conditions, to protect the deceased from the particular injuries which produced his death; (b) that the deceased assumed the risk of injury; and (c) that the deceased's own conduct was the sole proximate cause of his injury.

IV. ASSIGNMENTS OF ERROR

The petitioner assigns for error the following:

(1) The action of the court below in holding that the case should have been non-suited, and in entering judgment providing for a reversal of the trial court and a dismissal of the case (R. 124-134);

(2) The decision of the court below that as a matter of law there was no evidence, sufficient to support the jury's verdict, that the defendant was guilty of actionable negligence upon the occasion of the death of the deceased (R. 133);

(3) The decision of the court below that as a matter of law the deceased assumed the risk of his injury and death (R. 133);

(4) The decision of the court below that the 1939 Amendment to the Federal Employers' Liability Act (August 11, 1939; 53 Stat. 1404, c. 685, 45 USCA, Sec. 54) is inapplicable to this case (R. 133);

(5) The decision of the court below that as a matter of law the alleged negligence of the deceased was the sole proximate cause of his injury (R. 133).

V. SUMMARY OF ARGUMENT

1.

The Court below usurped the functions of the jury and erroneously concluded that as a matter of law there was no evidence of probative value that the defendant was guilty of actionable negligence upon the occasion of the death of plaintiff's intestate.

2.

Plaintiff's intestate did not as a matter of law assume the risk of injury and death, because: (a) Upon conflicting testimony of substantial probative value it was the duty of the jury to determine whether the deceased assumed the risk of his injury and death; and (b) the 1939 amendment to the Federal Employers' Liability Act applied to the present controversy and eliminated the defense of assumption of risk.

3.

Under the conflicting evidence in this case it was the function of the jury to determine whether the deceased met his death solely from his own negligence.

VI. ARGUMENT

PART 1

The Court below usurped the functions of the Jury and erroneously concluded that as a matter of law there was no evidence of probative value that the defendant was guilty of actionable negligence upon the occasion of the death of plaintiff's intestate.

The plaintiff introduced the evidence of several witnesses who testified that the rail and trackbed immediately opposite the derailler were in a defective condition. The rail was 24 years old when taken out of the defendant's main line track.

in 1936 and installed at Hurt, Virginia, and the underlying roadbed was not level and was supported by inadequate ballast. The derailer itself was not equipped with a signal light, although designed for one. The plaintiff introduced the evidence of two expert witnesses who testified in response to properly framed hypothetical questions that in their opinion, based upon many years of railroading experience and also observation of similar occurrences, the derailment which resulted in the death of plaintiff's intestate was caused by the defective rail opposite the rail upon which the derailer was set; that the derailment would not have occurred if the west rail had not been defective (R. 29-45). The derailer had a groove on the north or "wrong" end which would have carried the wheels on over and back on the east rail if the west rail had not been defective (R. 39-40, 137, 139, 140). Also, the derailer itself was loose and did not fit firmly upon the track. The evidence offered by the plaintiff was adequate to take the case to the jury, because regardless of who set the derailer the jury could properly find that the derailment was caused exclusively by reason of the defendant's negligence in failing to have and maintain the tracks and derailer in proper condition. When the court below held otherwise and reversed the trial court, the decision was contrary to the general Federal law and the decisions of this Court. *Tiller v. Atlantic Coast Line R. Co.*, — U. S. —, 87 L. Ed. (Advance Opinions) 446, — S. Ct. —; *Davis v. Wolfe*, 263 U. S. 239, 68 L. Ed. 284, 44 S. Ct. 64; *Cooley v. New York Central R. Co.* (C.C.A., N.Y. 1936), 80 F. (2d) 816, cert. den. 297 U.S. 721, 80 L. Ed. 1005, 56 S. Ct. 599; *Young v. Wheelock*, 333 Mo. 992, 64 S.W. (2d) 950, cert. den. 291 U.S. 676, 78 L. Ed. 1064, 54 S. Ct. 527; *Bailey v. Central Vermont R. Co.*, — U.S. —, 87 L. Ed. (Advance Opinions) 1030, — S. Ct. —; *Owens v. Union Pacific R. Co.*, — U.S. —, 87 L. Ed. (Advance Opinions) 1221, — S. Ct. —; *Seago v. New York Central R. Co.*, 315 U.S. 781, 86 L. Ed. 1188, 62 S. Ct. 806; *Lilly v. Grand Trunk Western R. Co.*, — U.S. —, 87 L. Ed. (Advance Opinions) 323, — S. Ct. —.

It is implicit in the opinion of the court below (R. 128-

130) that the hypothetical questions propounded to the plaintiff's expert witnesses were properly framed and competent. Such evidence was approved by the North Carolina Court in a case of this type decided a few years ago. *McGraw v. Southern R. Co.*, 206 N.C. 873, 175 S.E. 286; 209 N.C. 432, 184 S.E. 31. (See also *Summerlin v. Carolina & N. W. R. Co.*, 133 N.C. 550, 45 S.E. 898; *Parrish v. High Point Ry. Co.*, 146 N.C. 125, 59 S.E. 348; *Britt v. Carolina Northern R. Co.* 148 N.C. 37, 61 S.E. 601; *Hester v. Motor Lines*, 219 N.C. 743, 14 S.E. (2d) 794; and Note on Use of Hypothetical Question as a Basis of Expert Opinion, 20 North Carolina Law Review 100.) In a recent decision of this Court (*United States v. Johnson*, —U.S.—, 87 L. Ed. (Advance Opinions) 1109, —S. Ct.—) the advisability and value of such evidence was fully recognized. It appears, therefore, that whether the question of the competency of such evidence be regarded as a matter for determination by the rules of the *lex fori*, or whether it be deemed that, because of the vital connection between such evidence and the validity of the plaintiff's cause of action under a Federal statute, the competency of the testimony will be determined by this Court, the result is the same, and the evidence must be treated as having been properly submitted to the jury.

In reaching its conclusion that the defendant was guilty of no actionable negligence, the lower court seems to have held that although the deceased may have met his death as a result of the omissions of the defendant, the manner in which the death occurred was not reasonably foreseeable and that, therefore, the defendant did not breach any duty which it owed to the deceased. In its conclusions that no duty was owing to the deceased; and that in any event a duty, if existent, was not breached, the lower court has confused not only elemental principles of the law of negligence but also the functions of the court and the jury.

The general duties which the master owes the servant are absolute and do not vary with different factual situations. Two inviolate duties which the defendant owed the deceased

in the present case were: (a) The duty to exercise reasonable care to furnish the deceased a safe place in which to work, *Bailey v. Central Vermont R. Co.*, *supra*; *Washington and Georgetown R. Co. v. McDade*, 135 U. S. 554, 34 L. Ed. 235, 10 S. Ct. 1044; *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 S. Ct. 275; *Kreigh v. Westinghouse, etc. Co.*, 214 U. S. 249, 53 L. Ed. 984, 29 S. Ct. 619; and (b) The duty to furnish the deceased with reasonably safe tools. *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. Ed. 1107, 36 S. Ct. 624; *Kreigh vs. Westinghouse, etc. Co.*, *supra*. The principle of reasonable foreseeability arises only in the determination of whether the defendant breached, in such manner as to injure the deceased, one or both of the specified duties. There was ample evidence to the effect that both duties were breached. Hence, the only material question for decision in respect to this negligence of the defendant is whether the negligence was actionable, i.e., whether it was an effective, direct and proximate cause of the derailment and the injury resulting therefrom. In other words, did the failure of the defendant to exercise reasonable care to furnish the deceased a safe place in which to work and reasonably safe tools with which to work constitute the sole cause of the injury? The ability to foresee the particular consequences of a breach of duty is the test of whether such breach is the proximate cause of the injury and whether the negligence is actionable. In cases where the facts are disputed, the question of proximate cause and reasonable foreseeability is a matter for the determination of the jury. In the present case the defendant was clearly under a duty to anticipate the possibility of the train striking from the "wrong" end a derailer which was set for derailment. The evidence was fully ample to authorize the jury to find that trains frequently struck the "wrong" ends of derailleurs which were set in derailing positions, and that under normal conditions derailments usually did not occur. The holding in the opinion of the court below that the consequences which might follow from a car being backed over the "wrong" end of a derailer set opposite a defective rail could not reasonably be foreseen by the defendant is

directly opposed to the evidence. The defendant's superintendent had seen twenty-five to fifty instances of cars backed over the "wrong" end of derailleurs (R. 55), and the plaintiff's witnesses, Holden and Heritage, stated that they had, on several occasions, seen trains strike the "wrong" end of derailleurs (R. 29-30, 37-38). The testimony of the witness Heritage (R. 39-40) and defendant's Exhibits 2, 4, and 5 (R. 137, 139, 140) explain the manner in which the sustaining groove in a derailer normally holds a slow-moving train on the track if the derailer is struck from the "wrong" end. Manifestly, there is no operational necessity for a derailment when the train is proceeding from the opposite direction from which the derailer is set, and the existence of this groove in the derailer is a normal and reasonable safety device. The defendant calls attention to the fact that the derailer when approached from the "wrong" end presents a blunt and vertical surface. Presumably this method of construction is required by the nature of the device itself and is the reason why the sustaining groove is necessary to safeguard against the possibility of undesired derailments.

The foregoing factual analysis of the testimony points definitely to the conclusion that there was sufficient evidence of strong probative value to require the jury to decide whether the defendant could reasonably have foreseen that the train might back over the "wrong" end of the derailer and whether the negligent failure of the defendant to provide adequate track support on the opposite rail effectively produced the derailment. The petitioner submits that on the original question of the defendant's negligence and its causal relationship to the injury sustained, there was both ample evidence to require submission of the case to the jury and to support the jury's verdict on this issue.

In the case of *Richmond and Danville R. Co. v. Powers*, 149 U. S. 43, 37 L. Ed. 642, 13 S. Ct. 748, the Court expressed in the following convincing language the rule that in uncertain and debatable cases the general questions of negligence

and contributory negligence are matters for the determination of the jury:

"It is well settled that where there is uncertainty as to the existence of either negligence, or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

A case recently decided by this Court (*Bailey v. Central Vermont R. Co.*, *supra*) illustrates the duties which the Federal Employers' Liability Act imposes upon the railroad in factual situations similar to the case here presented. The *Bailey* case is compelling authority in support of petitioner's contention that, where, as in this case, the sum of the evidence produces conflicting testimony on the issue of the railroad's alleged negligence, the jury should be permitted to draw the inferences of fact and make the necessary determination with regard to the effective cause or causes of the occurrence. As in the *Bailey* case, this Court is requested by the petitioner to reject the judicial philosophy which apparently induced the court below to adopt a strict and limited construction of the Act. In the *Bailey* case the railroad was negligent in requiring the deceased to unload cinders at an unnecessarily dangerous place and under unnecessarily dangerous conditions; in the present case, the railroad required Brady to engage in a shifting operation at a place and under conditions which were rendered dangerous by reason of the railroad's negligence in the maintenance of its tracks, road-bed and derailer, and in the failure to provide a light on the derailer. The defendant undoubtedly contemplated the danger of an adverse verdict on the issue of its failure to maintain the track and derailer in proper condition, because it undertook to produce much evidence *contra* on this exact question (R. 64-69). The defendant's recognition of its duty to the deceased may be inferred from this evidence relating to its test and safety practices. It follows, therefore, that irrespec-

tive of who may have set the derailer the jury in this case were correctly charged with the responsibility of determining whether the railroad's negligence was the effective cause of the injury.

The defendant's actionable negligence may also be predicated upon that phase of the evidence which tends to indicate that a fellow servant reset the derailer after the deceased had opened it and that no warning or notice was thereafter given to the deceased. It is conceded by the defendant that no injury would have resulted to the plaintiff's intestate if the derailer had not been reset by someone, and the evidence is uncontradicted that there was no warning light upon the derailer which would have enabled the deceased to have observed that it was set on the rail. Therefore, if there is evidence from which the jury could find that a fellow servant set the derailer without specifically warning the deceased, then the plaintiff's recovery in the trial court should be sustained, because it appears from the evidence that during *switching* operations it is the usual rule and custom for the derailer to be kept off the track until the switching operation is completed (R. 45, 54, 81). This contention of the plaintiff was urged in the trial of the case and was presented for the consideration of the jury (R. 97-99).

In considering the testimony which bears upon this theory of the case it must be remembered that the only persons who had any knowledge of these facts were the surviving members of the train crew, all of whom were employees of the defendant and available as its witnesses. Not a one of them testified that the deceased reset the derailer after the train pulled north out of the pass track: the plaintiff could not hazard putting the direct question to the defendant's employees and the defendant carefully refrained from examining them on this point. It is submitted that when the testimony of the members of train crew is viewed in the light most favorable to the plaintiff it points unerringly to the conclusion that Brandt, the conductor, put the derailer on the track after the freight train cleared the switch before backing south on the main

line. This negligent act of a fellow servant, proximately resulting in the derailment which killed the plaintiff's intestate (R. 85), imposed liability upon the defendant. *Owens v. Union Pacific R. Co., supra.*

We review briefly the pertinent testimony of the members of the train crew: the fireman, Dorsett, said that when the train first arrived at Hurt, Virginia, "Mr. Brady was up on the engine with us [engineer and fireman]. Someone at the rear of the train had to turn the switch for it to back in and had to change the derailer, if it was closed. It would be closed because there were twelve cars in the pass track." (R. 83). The conductor said that he threw the switch and derailer so as to permit the train to back into the pass track (R. 63). At this time the conductor, Brandt, and the flagman, E. C. Scruggs, were on the caboose at the rear of the train (R. 63, 85). After the train backed into the pass track the deceased lined the switch for the northbound passenger train to pass on the main line (R. 21). The engineer and flagman testified that after the northbound passenger train (No. 30) passed by, Brady opened the derailer and switch so as to allow the train to pull back north into the main line before backing south to cut the train between the fourth and fifth cars (R. 21, 85). The twelve cars in the pass or storage track were to have been inserted between the fourth and fifth cars of the train (R. 18). During this operation the deceased was "on the four cars" next to the engine (R. 21, 63, 83), and the conductor, Brandt, was on the caboose at the rear of the train (R. 63, 85). The train then backed in a southward direction along the main line until it was south of the pass track switch, and "Mr. Brandt rode the rear end of the train when it backed up the main line." (R. 85). During this movement the deceased was on the fourth car (R. 21, 86). No one testified as to who lined the switch on this occasion so that the train could back south on the main line, the flagman stating that he did not know "who turned the switch so that the train could come back on the main line." (R. 86). But the defendant's witness M. I. Scruggs,

a freight engineer of many years experience on the run through Hurt, Virginia, testified that on such operations the head brakeman (the position occupied by the deceased) "generally stays...up around the front of the engine" (R. 80), and in coming out of the pass track "the caboose is the last thing that comes out, and when the caboose is clear of the switch someone has to throw that switch, and it is the conductor or flagman or swing man that does it, then the train comes on down the track" (R. 81). In response to a direct question this witness said that on such a movement the flagman and conductor would be at the back of the train "to close the switch and fix the derailer" (R. 81).

When the train was cut the deceased rode north up the main line beyond the pass track switch; the locomotive and four cars stopped; Brady opened the switch and signalled the engineer to back into the pass track, and then the derailment occurred when the lead truck of the fourth (or lead) car struck the derailer.

Upon this evidence arise the questions of when and by whom was the derailer set before the derailment occurred. There can be no dispute that it was set during the time which elapsed after the caboose passed beyond it on the northward movement out of the pass track and the happening of the fatal accident. It is submitted that upon the evidence adduced at the trial, as outlined above, only the conductor, Brandt, was in a position to line the switch during this period of time and the jury were amply justified in reaching the conclusion that he likewise "fixed the derailer" at the same time. It is manifest that the deceased could not, and did not, close the switch or set the derailer on this occasion. The brakeman (Brady) handled the switching at the *front* of the train and the conductor handled the operations at the *rear*, including the one in which the derailer was negligently reset. Under these circumstances, the instant case is clearly one in which the jury might properly find that the conductor was guilty of negligence proximately resulting in the death of the plaintiff's intestate. *Owens v. Union Pacific R. Co., supra.*

The petitioner believes that this Court, in harmony with its recently expressed liberal interpretation of the Act, will not permit the court below to substitute its judgment for that of the jury in this case, where all major facts are disputed and where the evidence is materially conflicting.

It is submitted that the Supreme Court of the State of North Carolina has, in this instance, wholly failed to follow the controlling principles of law applicable to this type of case in measuring the sufficiency of the evidence of defendant's actionable negligence.

PART 2

The deceased did not as a matter of law assume the risk of his injury and death.

(a) The jury were properly permitted to find, upon conflicting testimony of substantial probative value, that the deceased did not assume the risk of his injury and death.

If it be assumed, *arguendo*, that the 1939 Amendment (August 11, 1939; 53 Stat. 1404, c. 685, 45 USCA Sec. 54) to the Federal Employers' Liability Act did not operate to eliminate the defense of assumption of risk in this case, or if it be decided that the plaintiff waived the benefit of the retroactive effect of the amendment, it is nevertheless submitted that reasonable inferences to be drawn from the conflicting testimony fully justified the jury's verdict on the issue of assumption of risk. The evidence fails to disclose that the deceased had ever engaged in a railroad operation at Hurt, Virginia, or had ever even stopped at that point. The particular shifting operations occurred at a time when it was dark (R. 17); there was no light on the derailer, although a place for such a light existed (R. 21); the derailment occurred on a curve; and the derailment would not have occurred except for the defective condition of the rail and track at the point directly opposite the derailer (R. 33, 39). In view of the foregoing facts, and particularly since the testimony as to who actually reset the derailer points to a fellow servant of the deceased, it is apparent that the appropriate issue in-

volving assumption of risk was properly submitted to the jury for determination, and that the issue could not correctly be decided as a matter of law. The North Carolina Supreme Court substituted its judgment for that of the jury, and with a complete disregard for, or indifference to, the conflicting evidence, concluded that as a matter of law the deceased assumed the risk of injury.

The latest decision of this Court on the general subject of assumption of risk (*Owens v. Union Pacific R. Co.*, *supra*) demonstrates the view of this Court to the effect that assumption of the risk should not be permitted to bar recovery by masquerading under spurious guises such as "non-negligence", "sole negligence", "primary duty violation". By legislative action the outmoded absolute defenses of fellow servant negligence and contributory negligence were eliminated, and this Court has emphatically decided in the *Tiller and Owens cases*, *supra*, that these defenses shall not be permitted to assume the cloak of assumption of the risk. In the same manner, this Court has refused to permit assumption of the risk to be used as a basis for a judicial fiat that no negligence exists in cases where the evidence, when considered independently of the employee's own conduct, is highly conflicting upon the subject of negligence of the railroad. In other words, in cases where the defense of assumption of the risk may be appropriately interposed, it must be regarded as a pure defense and not as a basis for declaring that the railroad was not negligent in situations where extensive evidence of actual negligence is presented.

In the case of *Bailey v. Central Vermont R. Co.*, *supra*, the judicial policy of permitting the jury to decide questions of the railroad's negligence in cases involving controverted facts was effectively established. Similarly, in the *Owens case* it has been declared that upon conflicting testimony, such as exists in the instant situation, the jury shall not be deprived of the right to determine whether or not the injured employee is chargeable with his own injury by reason of his alleged assumption of the risk or independent conduct.

An analysis and comparison of the evidence and the factual situations in the *Owens case* and in the present case leads inescapably to the conclusion that the *Owens case* is convincing and controlling authority to support the contention that the jury must be permitted to determine whether the deceased by his own conduct (whether such conduct be labelled assumption of risk, sole negligence, violation of primary duty, or contributory negligence) effectively caused his own death. In the *Owens case*, the undisputed testimony disclosed that the deceased intentionally walked, without keeping a lookout, directly into a known danger and risk, in that he attempted to walk across the track at a time when he knew that almost instantaneously the cars which were in close proximity to him on the same track *would* or *might* (depending upon the jury's view of the evidence) be "kicked" suddenly toward and upon him. In Brady's case, the deceased's actions constituted, at most, negative negligence, i.e., a failure to ascertain that the train was backing toward a dangerous condition. In the light of the *Owens case*, the jury were properly permitted to appraise the practical effect of Brady's conduct. As said by this Court in the *Owens case, supra*, (at p. 1225 of the L. Ed. Advance Opinions), when "Congress abolished the fellow-servant rule as a defense under the statute, it necessarily abolished the defense of assumption of risk to this extent. In other words, it eliminated the general anticipation of fellow servants' negligence. . ." Since the defendant failed to make any showing that the deceased knew of and accepted the specific risk in this particular instance, the failure of plaintiff's intestate to ascertain that the derailer had been reset could at most be merely some slight evidence of contributory negligence, and this has been resolved against the defendant by the jury's verdict (R. 8).

(b) *The 1939 Amendment to the Federal Employers' Liability Act applied to the present controversy and eliminated the defense of assumption of risk.*

The 1939 Amendment (August 11, 1939; 53 Stat. 1404, c. 685, 45 USCA Sec. 54) made Section 4 of the Federal Em-

employers' Liability Act read as follows (the language of the Amendment being in italics) :

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case *where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.*"

In construing the amendment this Court held in the case of *Tiller v. Atlantic Coast Line R. Co., supra*, that every vestige of the doctrine of assumption of risk was eliminated by the statute. However, this Court has not yet directly determined whether the amendment applies to causes of action which arose prior to the enactment of the amendment, but where the trials occurred subsequent thereto. (*Owens v. Union Pacific R. Co., supra*). The injury and death of the deceased in the present case occurred on December 25, 1938, the amendment was enacted as of August 11, 1939, and the case was tried in March, 1942. In the opinion in the lower court it was said: "The amendment of 1939 to the Federal Employers' Liability Act is inapplicable here . . ." It will also be observed from an examination of the brief in opposition to petition for writ of certiorari that the respondent contends that by submitting to or acquiescing in the submission to the jury of an issue on the question of assumption of risk the petitioner is now precluded from asserting that the 1939 Amendment applied to the present case. For the reasons set forth in petitioner's brief in reply to the respondent's brief in opposition to petition for certiorari, it is respectfully contended that this Court should consider the question of the applicability of the 1939 Amendment to the present controversy. It is immaterial that this particular point was not raised in the state trial court, because

the Supreme Court of North Carolina has undertaken to pass upon this Federal question of law. Therefore, the matter is open for the determination of this Court, since the highest state court has decided against the claim under the Federal law. *Home Insurance Co. v. Dick*, 281 U.S. 397, 74 L. Ed. 926, 50 S. Ct. 338; *Gant v. Oklahoma City*, 289 U.S. 98, 77 L. Ed. 1058, 53 S. Ct. 530.

Defenses in actions governed solely by statute are matters of Congressional favor and grace and not matters of right. Accordingly, Congress may withdraw such defenses and make such withdrawal effective at any date which it deems advisable, and it may give effect to such legislation in respect to a pending action.

In view of the remedial and curative character of the Amendment, and because of its socially progressive object, the statute should be construed liberally in all respects, and the usual presumption against retroactivity should be deemed inapplicable to this situation. The salutary purpose of the amendment should be enlarged—not restricted.

If the emasculating effect of the doctrine of assumption of the risk (*Lilly, Tiller, and Owens cases, supra*) was a special evil which Congress sought to eliminate in connection with the general problem of providing a system of compensation for injuries to employees engaged in interstate railroad operations, then there is no legal reason, other than possible interference with a vested right, which should operate in favor of a restriction of the amendment to cases arising after the enactment of the change in the law. It is elemental legal learning that if the question is one of remedy the power to enact a retroactive law rests in the legislative authority and does not impinge upon a vested right.

In the case of *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 63 L. Ed. 1058, 39 S. Ct. 553, this Court held that no person has a vested right entitling him to have unchanged the existing rules of law concerning an employer's responsibility for personal injury or death of an employee.

The following cases also support the view that the power resided in Congress to give retrospective force to the 1939 Amendment:

South Carolina v. Gaillard, 101 U.S. 433, 25 L. Ed. 937; *Ewell v. Daggs*, 108 U.S. 143, 27 L. Ed. 682, 2 S. Ct. 408; *Campbell v. Holt*, 115 U.S. 620, 29 L. Ed. 483, 6 S. Ct. 209; *Carpenter v. Wabash R. Co.*, 309 U.S. 23, 64 L. Ed. 558, 60 S. Ct. 416.

The statute as it existed at the time of the trial abolished the defense of assumption of the risk "in any action brought . . . under . . . the . . . Act . . ." There is no limitation of applicability to "new actions", or "suits upon causes of action hereafter arising", or to similar situations which might indicate a prospective operation of the statute. The use of the word "brought" instead of the words "to be brought" indicates that the Amendment was intended to apply to all cases under the Act, including those then pending but not tried.

When Congress enacted this revision of the law, no saving or exclusion clause with reference to pending claims or litigation was included, nor did the amendment specify that it was to become operative at some future date or with respect only to a particular class of such cases. The Amendment was manifestly intended to clarify the existing section of the statute and give it a meaning consistent with the beneficial purposes which the act was designed to achieve. Judicial construction of the original Sec. 4 had produced results not contemplated when the statute was first enacted, *Tiller v. Atlantic Coast Line R. Co.*, *supra*.

The 1939 Amendment abolished the concept, doctrine, and defense of assumption of risk. In other words, from the moment it became law railroad carriers sued under the Act were deprived of the right to plead and rely upon this defense which was formerly available to them. Congress evidently intended to ameliorate immediately what Justice Black has referred to as the morally unacceptable proposition that a man compelled

by economic circumstances to follow a hazardous employment must bear the consequences attendant upon the risks known to him. *Tiller v. Atlantic Coast Line R. Co.*, *supra*, footnotes 20-22, inclusive. To give the Amendment the retroactive application which is suggested would deprive the defendant of no right in this case. The 1939 Amendment automatically removed this defense from all cases not previously adjudicated.

In the decision of the North Carolina Supreme Court the term "assumption of risk" is actually used to denote a means of appraising the defendant's negligence (as well as the alleged sole negligence of the deceased). This analysis is suggested by the *Tiller case*, *supra*. Since this is true, if the 1939 Amendment to the Act completely eliminated the concept of assumption of risk, irrespective of the date when the accident may have occurred, this Court should weigh the defendant's negligence on scales not affected by the weight of a discarded doctrine.

For the foregoing reasons it is submitted that the action of the lower court in dismissing the plaintiff's case on the grounds of assumed risk was erroneous.

PART 3

Under the conflicting evidence in this case it was the function of the jury to determine whether the deceased met his death solely from his own negligence.

The North Carolina Supreme Court, although confusing the concepts of assumed risk and sole negligence, expressly held that the deceased's own conduct was the sole proximate cause of his injury and death (R. 133). This decision was apparently based upon the court's assumption that the deceased set the derailler in derailing position immediately prior to the derailment, and upon the court's conclusion that it was the duty of the deceased to open the derailler before he signalled the train into the pass track.

The evidence on the question as to who set the derailler is not positive and direct but wholly circumstantial (see discussion above under Part 1 of the Argument), and the jury

could find from the testimony that the deceased set the derailer, or that the conductor did so, or that the evidence was too speculative to warrant a definite decision on this particular point. It will be noted that the testimony of the conductor himself (R. 63) does not preclude the view that he set the derailer when the train left the pass track following the passage of the northbound passenger train, and the other evidence tends to indicate that he did reset it. It is significant that notwithstanding the highly circumstantial character of the evidence upon this subject, the court below assumed as a matter of law that the deceased placed the derailer on the rail, and in reaching this conclusion the court below predicated its view upon only that portion of the evidence which placed the deceased near the derailer during a part of the operations. The inference to be drawn on this subject was clearly a matter for the determination of the jury, and by reason of its answers to the first, second and third issues the jury of necessity reached one of the following conclusions with regard to the setting of the derailer: (a) that the deceased did not set the derailer, and that it was set by some other employee of the defendant; or (b) that even if the deceased did set the derailer, this conduct of the deceased was not the proximate cause of the derailment; or (c) that the evidence would not permit a determination of this fact which became immaterial upon a finding that the proximate cause of the accident was the defective condition of the west rail and underlying track bed. In view of the cumulative and conflicting character of the evidence, the question of proximate cause was properly determined by the jury. As pointed out above, Brady opened the derailer and switch, but the jury might readily conclude that he could not (because of his position at or near the front of the train), and did not, line the switch and reset the derailer. Certainly the testimony of the witnesses Holden and Heritage (R. 33, 39) justified a conclusion by the jury that regardless of who set the derailer, the negligence of the defendant in maintaining a defective west rail and track proximately caused the derailment.

The petitioner calls attention to the fact that there is no evidence to justify the lower court's statement that the deceased was under a duty to open the derailer. Unless the deceased himself set the derailer or knew that it had been set, the deceased could not be required as a matter of law to assume the unconditional responsibility of removing the derailer before the train entered the pass track on the fatal operation. *Owens v. Union Pacific R. Co., supra*. At most the question was a problem for the consideration of the jury, and the jury has elected to adopt a view of the evidence which exonerates the deceased from responsibility, or at least which determines that the actions or omissions of the deceased were not one of the effective proximate causes of the derailment and the injury.

In appraising the conduct of Brady the lower court not only invaded the province of the jury, but after having done so (and after having decided, upon controverted evidence, that the deceased was negligent) described what at most was "contributory negligence" as "sole negligence" and "assumption of the risk", and in this respect employed its own version of the "primary duty rule" as a means of denying any recovery. In the *Tiller case, supra*, this Court impliedly rejected a similar system of reasoning through legal clichés which was the basis for the decisions in the cases of *Unadilla Valley R. Co. v. Caldine*, 278 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91, and *Davis v. Kennedy*, 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 33.

The court below assumed the role of the jury, and also fell into the common error (commented upon by this Court in the cases of *Tiller v. Atlantic Coast Line Railroad Co., supra*, and *Owens v. Union Pacific R. Co., supra*), of confusion of terms in its analysis of the effective cause of the derailment. In this latter connection we call attention to the following language from the court's decision: "Hence having himself handled the derailer, and having neglected to place it open for this last movement of cars, as it was his duty to do, he would be conclusively deemed to have assumed the risk of injury which was caused by his own act or omission. . . . And his neg-

ligence in this respect would be regarded as the sole proximate cause of his injury. . . ."

In the first instance the court disregarded strong evidence to support the view that the defendant should have foreseen the particular hazard to which the deceased was subjected by the defendant's negligent acts, and held that as a matter of law the defendant was not negligent. Then the court proceeded to label as "assumption of the risk" and "sole negligence" conduct which under any reasonable interpretation was at most some evidence of contributory negligence. In other words, by the artful use of nomenclature and by ignoring conflicting evidence the court below developed a theory which improperly withdrew the case from the jury and which in effect constituted the court as the triers of the facts.

In recent cases decided by this Court general emphasis has been placed upon a liberal and humane approach to questions of liability under the three kindred statutes—Federal Employers' Liability Act, 45 USCA Sec. 51, *et seq.*; Boiler Inspection Act, 45 USCA Sec. 22, *et seq.*; and Safety Appliance Act, 45 USCA Sec. 1, *et seq.* In the case of *Lilly v. Grand Trunk Western R. Co.*, *supra*, Justice Murphy referred to the "humanitarian purpose" of this field of legislation, and also observed that the Boiler Inspection Act should be "liberally construed in the light of its prime purpose, the protection of employees and others. . . ." Similarly, in the case of *Bailey v. Central Vermont R. Co.*, *supra*, Justice Douglas observed: "Reasonable care and cause and effect are as elusive here as in other fields. . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them". Petitioner does not argue that in cases where there is no evidence of probative value to establish actionable negligence of the defendant the jury should be converted into a legal mechanism for fixing the amount of the recovery under a pseudo-workmen's compensation system. But it is respectfully asserted that this case, in its worst light from petitioner's viewpoint, falls within the liberal approach which this Court has

approved in situations involving debatable theories as to the cause of injury, and that there was ample basis and compelling justification for submitting all issues of negligence, causation, and damages to the jury.

VII. CONCLUSION

For all of the above reasons, the petitioner respectfully submits that the Supreme Court of the State of North Carolina grounded its decision upon erroneous conceptions of the general principles of negligence as enunciated by this Court in the construction of the Federal Employers' Liability Act. It is further submitted that the dismissal of the action by the court below constituted an unwarranted invasion of the province and functions of the jury (*Jacob v. City of New York*, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854), and deprived the plaintiff of her rights under the Federal statutes. The court below failed to give proper legal weight to the integrated and cumulative character of the evidence, and, due to an isolated and piecemeal consideration of the evidence and the disputed facts, the court below erroneously concluded that no jury question was presented by the testimony. This approach has been rejected by this Court in cases similar in principle to the present case. *Bailey v. Central Vermont R. Co.*, *supra*; *Union Pacific R. Co. v. Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318.

In view of the foregoing considerations, petitioner requests this Court to reverse the decision of the North Carolina Supreme Court and to direct an affirmance of the judgment of the trial court.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 830.

IRENE BRADY, ADMINISTRATRIX OF THE ESTATE OF EARLE A.
BRADY, DECEASED, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, *Respondent*.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR CERTIORARI.**

OPINION BELOW.

The opinion of the Supreme Court of North Carolina is reported in 222 N. C. 367.

STATEMENT OF CASE.

This is a suit by petitioner, begun in the Superior Court of Guilford County, North Carolina, on July 26, 1939, (R. 1), to recover damages for the death of her intestate, Earle A. Brady, on December 25, 1938 (R. 2). The suit was brought under the Federal Employers' Liability Act. Issues of negligence, assumption of risk, contributory negligence and damages were submitted to a jury, after motion

for nonsuit by respondent was overruled. All the issues were answered for petitioner, resulting in a judgment for \$20,000.00.

On appeal the unanimous decision of the Supreme Court of the State of North Carolina was that (1) there was no evidence of negligence on the part of respondent and (2) that Brady, a brakeman, caused his death solely and proximately by reason of his negligence in setting a derailer on the rail of a storage track, at Hurt, Virginia, and then signalling the engineer to back against it with a cut of four cars, on which Brady was riding at the time they struck the derailer.

JURISDICTION.

Petitioner invokes certiorari jurisdiction of this Court under Judicial Code Section 237 (b), amended, 28 U. S. C., Sec. 344 (b).

The respondent admits that this Court has certiorari jurisdiction of this case. It contends that petitioner has shown no such case as would warrant the exercise by this Court of its judicial discretion under Rule 38, 5 (a), inasmuch as there do not exist in this record any special and important reasons for the granting of the writ. This is an ordinary case involving the usual question in a tort action: whether the evidence was sufficient to justify submission of the case to a jury or called for direction of a verdict for respondent, under well settled rules of law—the kind of case as to which it is contemplated that ordinarily the court below shall be the court of last resort.

Where, as here, the case simply involves an appreciation of all of the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury and the Supreme Court cannot say that in so concluding manifest or palpable error was committed, the decision of the state court will not be disturbed. *Great Northern R. Co. v. Knapp*, 240 U. S. 464; *Erie R. Co. v. Welsh*, 242 U. S. 303.

It is pointed out that the question of whether the 1939 Amendment to the Federal Employers' Liability Act dealing with assumption of risk is not properly before this Court and jurisdiction if based thereon would be erroneous. This is so because at no time and in no manner did petitioner, either in the trial court or in the court below, set up or claim any immunity from respondent's defense of assumption of risk either under the Act or under the Amendment of 1939.

As stated by the court below "The case was fought out on grounds selected by the plaintiff." Upon the trial an issue on assumption of risk was submitted to the jury without objection or exception by the petitioner. State rules of practice and procedure govern in an action in the state court under the Federal Employers' Liability Act. *Central Vermont R. Co. v. White*, 238 U. S. 507; *Chesapeake, etc. R. Co. v. De Atley*, 241 U. S. 310; *Flemming v. Norfolk Southern R. Co.*, 160 N. C. 196; *Batton v. A. C. L. R. Co.*, 212 N. C. 256, certiorari denied, 303 U. S. 651. In the North Carolina courts a party cannot complain of an issue submitted to the jury where he does not except and submit other issues. *Drennan v. Wilkes*, 179 N. C. 512; *Exum v. Chase*, 180 N. C. 95.

In the petition (p. 6) it is said: "In the trial court the federal questions sought to be reviewed in this Court were raised originally by the pleadings (R. 3, 5) and were supported by the evidence and admissions of the defendant (R. 12-14)."

A thorough search of the record has failed to reveal to us that by the pleadings, evidence, admissions, or in any other manner did the petitioner make any contention in the trial court that the Amendment of 1939 was retroactive so as to eliminate assumption of risk as a defense in the case. On the contrary all of the issues submitted to the jury were fought out on the merits, it being unquestioned that assumption of risk was a defense in a proper case, but it being contended by counsel for petitioner, both in the trial

court and in the lower court only that the deceased was not guilty of assumption of risk under the facts of the case.

Petitioner should not now be heard to complain, for the first time, of a ruling of the lower court on a point of which her counsel were fully apprized, but did not contest, either in the trial court or in the court below; the point being that the Amendment was not retroactive.

Upon the foregoing facts there was no timely raising of a federal question in respect to the question as to whether the Amendment thereto was retroactive. *Montana v. Rice*, 204 U. S. 291; *Atlantic Coast Line R. Co. v. Mims*, 242 U. S. 532; *Lynch v. New York*, 293 U. S. 52; *Honeyman v. Hanan*, 300 U. S. 14; *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U. S. 206.

In respondent's brief on appeal to the Supreme Court of North Carolina it raised, among others, the point (1) that the plaintiff was barred by her intestate's assumption of risk and the point (2) that the Amendment of 1939 should not be given retroactive effect to eliminate this defense. Counsel for petitioner in their brief on appeal, filed sometime thereafter, naturally combatted the first proposition, but did not take issue in any way with the second proposition to the effect that said Amendment was not retroactive; nor did they so contend in any manner. In short, the petitioner made no contention either in the trial court or in the Supreme Court of North Carolina that the Amendment of 1939 was retroactive and eliminated the defense of assumption of risk.

This jurisdictional defect would not have arisen if the Supreme Court of North Carolina had decided the question of whether or not the Amendment of 1939 to the Federal Employers' Liability Act was retroactive. It did not decide that question. Respondent further contends that it did not decide the question of "assumption of risk". It is true that the lower court said:

"* * * Hence having himself handled the derailer, and having neglected to place it open for this last movement of cars, as it was his duty to do, he would be

conclusively deemed to have assumed the risk of an injury which was caused by his own act or omission. *Southern Ry. Co. v. Youngblood*, 286 U. S., 313; *Unadilla Valley Ry. v. Caldine*, 278 U. S., 139, 73 L. Ed., 224 (note). And his negligence in this respect would be regarded as the sole proximate cause of his injury. *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88; *Butner v. Spease*, *supra*; *Jeffries v. Powell*, 221 N. C., 415. The amendment of 1939 to the Federal Employers' Liability Act is inapplicable here. *McCrowell v. R. R.*, 221 N. C., 366 (377)."

It is our contention that when the court below said that the deceased would be conclusively deemed to have assumed the risk of an injury, it was not using the term "assumed the risk" in the same significance as in the doctrine of "assumption of risk" referred to in the statutes and the amendment thereof. Furthermore, when that court said that the Amendment of 1939 to the Federal Employers' Liability Act was inapplicable, it was not holding the Amendment inapplicable because not retroactive; it was merely stating that the amendment had no place in this case, whether retroactive or not. This appears to us necessarily so because the court had just held, and throughout its decision held, that the deceased's negligence "would be regarded as the sole proximate cause of his injury".

Moreover, the opinion of the lower court being fully and adequately (and we say solely) based on grounds relating in no way to the doctrine of assumption of risk or to the question of whether the Amendment of 1939 should be retroactively applied, that question is not before this Court.

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that judgment as rendered could not have been given without deciding it.

Lynch v. New York, 293 U. S. 52; *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U. S. 206.

STATEMENT OF FACTS.

The facts stated in the Petition and Supporting Brief are insufficient for a proper understanding of the factual situation in this case. In several instances we contend that there are inaccuracies, and that many material facts have been omitted. Therefore, we deem it necessary to set forth a statement of the facts.

At the time of the death of plaintiff's intestate he was engaged in the performance of his duties as brakeman on a freight train, consisting of an engine and 37 cars, running from Spencer, North Carolina, to Monroe, Virginia. The train arrived at Hurt, Virginia, between those two points, at 5:50 A. M., and the accident occurred about 6:30 A. M. It was still dark and the deceased had a lantern with which he was giving signals for the movement of the train to the engineer.

Plaintiff's intestate was an experienced railroad man. The petitioner testified that he had been a brakeman on the railroad since 1922 and that during that time he had frequently made runs as brakeman from Spencer, North Carolina, to Monroe, Virginia, and back on both freight and passenger trains (R. 18). Hurt, Virginia, has a connection with the Virginia Railroad on which connection the respondent receives heavy deliveries of coal and trains go into this storage track to pull connections and to place northbound coal thereon (R. 66). The testimony of the petitioner leads us to differ with the statement of counsel for petitioner that: "There was no evidence that the deceased was familiar with the tracks and switches at Hurt, Virginia." (Petition, p. 4).

At the time of his death he was riding the lead end of a gondola freight car which was one of a cut of four cars being backed into the storage track. He was in charge of that movement and was giving signals by lantern to the

engineer to proceed. While he was so engaged, the car upon which he was riding ran over the "wrong end" of a derailer in derailing position on said storage track. The car was derailed and Brady was thrown from it to the track and was run over and killed.

The Nature and Purpose of a Derailer.

Derailers are in common use on all railroads. They are used on storage tracks (R. pp. 23 and 52). Brady was thoroughly familiar with them. They are used on storage tracks where cars are parked or left without attending railroad employees. Where there is such a track, which has some downgrade sufficient to cause a loose car to roll down and into the switch and foul the main line, a derailer is put near the downgrade outlet switch of that track. Its sole purpose is to derail cars to prevent them from rolling out of the sidetrack onto the main line.

That being the purpose of a derailer, it is designed and shaped to carry out that purpose. (Defendant's Exhibit No. 1 and Exhibit No. 2, R. Supplement). Its placement is controlled by a rod leading to a handle, or lever, rather similar to a switch handle or lever. By the use of that handle or lever the derailer may be moved away from the rail so that cars may run over the rail freely. By another movement of the handle it may be put back on the rail so that it will derail cars (R. p. 89).

It is a large, heavy piece of iron weighing from 50 to 75 pounds, designed to rest on top of the rail. It is always placed on the outer rail of the storage track, or the rail away from the main line. It is placed near the switch outlet. The end of the derailer farthest from the switch and pointing toward the stretch of storage track on which cars will be parked is tapered. That tapered end fits quite closely to the rail and is but little above the rail. It then gradually rises to a height of about three or four inches (R. p. 41). As it rises from its tapered end there is a groove and a ridge leading from the

inside of the rail and the inside of the derailer across the derailer and toward the outside. This is so designed that it will catch the flange of each outer wheel of the approaching cars and will carry those flanges over the outer rail so that the wheel will drop outside of that rail. The flange of the corresponding wheel at the other end of the axle is against the inner part of the opposite rail and as that wheel is pulled away from the rail it drops between the rails. Thus, the derailer is designed to derail drifting cars away from the main line so that certainly they will leave the rail before getting to the main line and certainly they will leave the rail and get on the ground away from the main line as an insurance against the dangerous fouling of the main line.

The other end of the derailer, the end nearest the switch, and frequently spoken of by the witnesses as the "wrong end" of the derailer, has no particular function or design. It is merely the end off which the derailed wheel drops. It is not tapered, but blunt, and rises quite abruptly to a height of about three or four inches (R. p. 41). It is not designed either to derail or to hold on the rails cars approaching from the main line. If wheels coming to this "wrong end" hit this heavy fixed obstruction they will jump and where they will land, no one can tell. Cars approaching from the main line are not supposed to run over a derailer (R. pp. 39-40 and 52-53): The evidence on this was unanimous and uncontradicted. J. Russell Holden and J. D. Heritage, witnesses for the plaintiff, stated that they had had many years experience as brakemen and that they had never signalled for cars to run over a derailer from the wrong end. They said that they realized the danger that would be involved in doing so and that it was the general custom to leave the derailer off until the switching operation was completed. They said that you were not supposed to run trains of any kind over derailleurs, either way, and that it certainly would be careless to signal the movement of a train to come over on the derailer if you know it is set on the rail and that the use that the rail is supposed to be put to is for the

wheels of the train and cars to run over those rails with the derailer off, and that it is a safety device altogether (R. pp. 39-40 and 52-53).

The Track Lay-Out and the Physical Situation.

The accident occurred at Hurt, Virginia, somewhat south of the station, as shown on defendant's photographic Exhibit No. 6 (R. Supplement). At this point there were four tracks. On the west there was first a track known as a house track. Next there was the southbound main line. Next there was the northbound main line. Next there was a storage track on which the accident occurred (R. pp. 22 and 27).

At the north end of the storage track there was a switch, which was somewhat south of the Hurt station. About four car lengths south of the switch and on the outer or eastern rail of the storage track was a derailer. There was no light on the derailer stand although there were prongs upon which a light could be placed. According to the uncontradicted testimony there are customarily and regularly no lights on derailleurs in an automatic block system such as the defendant had at the place in question. None of the witnesses, except Paul Shields, testified that they had ever seen a light on a derailer in an automatic block system and they testified that derailleurs are only used on storage tracks (R. pp. 23, 59, 62, 64, 75, 90, 91).

On the storage track more than 37 car lengths south of the derailer there were 12 cars parked (R. pp. 20-21). These cars were to be picked up by the train upon which Brady was brakeman. South of the derailer, between the derailer and the north end of the 12 parked cars, a public road crossed all of the tracks of the defendant at about right angles. This road crossing was about one-eighth of a mile south of the derailer (R. pp. 25-26, 27).

The storage track was installed in 1936 and the rails were taken from a section of the main line. The uncontradicted testimony was to the effect that it was a "practice of the Southern Railway Company and every other railroad to use

relay rails, which means to take rails out of the main line and use them in sidings and industrial tracks" (R. pp. 67-68). It appears from the testimony of witness M. V. Drinkard that the rails have not been changed and that they are the same rails today that were installed in 1936 (R. p. 58). The rail opposite the derailer bore a date mark of 1912.

The uncontradicted evidence is that the heaviest engines, weighing 350,000 pounds, have been in and out of this storage track practically every day with a large number of freight cars from 1936 until the time of trial in 1942, and that there has been no change or repair of the rails, cross-ties, derailer or any other part of the track since the accident on December 25, 1938 (R. pp. 60, 66, 96).

The track at the point in question was gauged on the afternoon before the accident and immediately following the accident, and the track gauge showed both times that the track gauged the exact required or proper width of four feet eight and one-half inches (R. p. 59).

The Movements of the Train.

The train in question was a Southern Railway freight train from Spencer, North Carolina, to Monroe, Virginia. It had an engine, 37 cars and a caboose. It arrived at Hurt, Virginia, about 5:50 A. M., on December 25, 1938. The accident occurred between 6:20 and 6:30 A. M., on said day. At the time of the accident and at all times prior thereto it was dark and signals were given by lantern. When the freight train pulled into Hurt it had orders to go on the storage track to let northbound passenger train No. 30 pass and then pick up the 12 empty cars. Those cars were destined for Lynchburg, Virginia. The freight train had four empty cars also destined for Lynchburg, Virginia, which were attached at the front end of the train next to the engine. Therefore, the proposed movement was to let No. 30 pass and then switch the 12 cars from the pass (storage) track into the freight train between the four cars destined

for Lynchburg and the remainder of the train. This proposed movement was explained to the train crew by the conductor (R. p. 74).

Between the north end of the 12 parked cars and the derailer there was sufficient room to place the whole freight train of 37 cars (R. p. 74).

As its first movement the freight train, which had pulled up on the main line north of the switch, backed into the storage track. After some wait, No. 30 passed going north.

As its second movement, the freight train pulled out of the storage track and on the main line north of the switch.

As its third movement, the freight train backed on the main line to a point where the engine was south of the switch leading into the storage track. On this movement the engine backed far enough south to clear the public road, above mentioned, which crossed the tracks about one-eighth of a mile south of the derailer. The train stopped there. The coupling between the fourth car back of the engine and the remainder of the train was uncoupled by Brady (R. pp. 21, 24 and 75).

As its fourth movement, the engine and four cars headed north and pulled up so that the rear end of the fourth car was north of the switch leading into the storage track.

As its fifth movement, the engine and four cars backed into the storage track. Brady was riding on the lead end of the first of these four cars, the southeastern corner of that car, or the corner on the side of the engineer and on the side of the switch stand and on the side of the derailer and the derailer stand. Brady had a lantern and had signalled the engineer with it to come back into the storage track with the cut of four cars (R. p. 21).

At this time the derailer was on the rail or set to derail cars which might roll out of the track. When the lead end of the car on which Brady was riding struck the wrong end of the derailer it was moving about 3 or 4 miles an hour. The uncontradicted testimony shows that the four cars derailed, the leading truck on each car as it backed into

the siding having derailed. The front truck on the car on the south end, that is the lead end, had derailed to the west. The leading or front truck on the second car had derailed to the east. The leading or front truck on the third car had derailed to the west. The leading or front truck on the car next to the engine had derailed to the east. None of the trucks of the four cars except the front trucks of each of them derailed or came off the track (R. pp. 22, 60, 83, 84). None of the rear trucks of any of the four cars came off the rails.

The Positions and Movements of the Personnel.

The freight train in question was manned by five men; the engineer, Woolson, the fireman, Dorsett, the brakeman, Brady, the flagman, Scruggs, and the conductor, Brandt. There was nobody else in the crew (R. p. 20).

The Conductor: Just before the first movement of the freight train from the northbound main line track into the storage track, the conductor opened the switch leading into the storage track and removed the derailer from the outside rail of the storage track. Then the conductor went back about one-eighth of a mile to protect the highway crossing and remained there until the train came out of the storage track and backed down the main track again on its third movement. On that third movement the conductor rode the caboose from the highway crossing down to the end of that movement and then went across to inspect the 12 cars which his train was going to pick up. He continued that inspection and remained at those 12 cars, some 75 car lengths from the derailer, until after the accident. Upon signal from the engineer immediately following the accident he came forward from those 12 cars to the scene of the accident (R. pp. 22, 74, 75, 76, 99 and 102).

The Flagman: The flagman, E. C. Scruggs, stayed in the caboose until after No. 30 passed. He then went back to flag anything that might approach from the south and to take

the brakes off of the 12 cars which were to be picked up. He did not touch either the switch or the derailler and he got off the caboose while the train was in the storage track and went south to flag and to take off brakes (R. pp. 22, 99, 101, 102). He was so engaged at all times until the time of the accident. After the accident and upon signal from the engineer, he went forward or north from the 12 cars to the scene of the accident (R. pp. 22, 101, 102).

The Fireman: The fireman, A. L. Dorsett, at all times during the several movements of the train was on his seat box on the left-hand side of the cab, on the western side of the engine. He was on the side away from the storage track, the switch and the derailler. He was on the side away from Brady who was giving signals to the engineer to enter or leave the storage track (R. pp. 22 and 99).

The Engineer: The engineer, L. O. Woodson, at all times during the several movements of the train was on his seat box in the cab of the engine on the right side, the eastern side of the engine. He was on the side of the storage track, the switch, the derailler and Brady, who was giving signals to enter or leave the storage track (R. pp. 20 and 99).

The Brakeman: Earle A. Brady, plaintiff's intestate, was the brakeman. After the train had moved into the storage track to await the passing of No. 30, Brady closed the switch and also put the derailler back on the rail (R. p. 25). After No. 30 passed Brady removed the derailler from the rail and opened the switch and signalled the engineer to come back out on the main line (R. p. 25). After the train had moved out on the main line as its second movement and back down the main line and passed the highway crossing as its third movement Brady uncoupled the coupling between the fourth and fifth cars back of the engine. Brady was on these four cars and the engineer saw him get off of them at the time that he uncoupled them from the rest of the train south of the crossing (R. p. 25). Brady rode

back north on these four cars until he got north of the switch. He got off the car and threw the switch and got back and signalled the engineer. The plaintiff's witness, L. O. Woodson, testified to the foregoing without any contradiction and also testified that "from the time I came out of the switch until I came back in there I never seen anybody else in there, other than Mr. Brady." (R. p. 25.)

Brady caught the lead end of the fourth car and when it passed over the derailer he was thrown off and killed. Those movements of Brady are unquestioned. Although there is no direct evidence from any person who actually saw Brady close the switch to permit the train to back up on the main line as its third movement (and this is the time when he must have put the derailer back on the rail), the location of every other member of the train crew was accounted for as above set out. The inevitable conclusion is that Brady put the derailer on the rail when the train came out of the storage track and failed to take it off the rail before he signalled the engineer to come back into the storage track from the main line. The plaintiff offered no evidence tending to show that any person other than Mr. Brady touched, or was anywhere near, the switch or the derailer, after the conductor first opened the switch and removed the derailer to let the freight train into the storage track for No. 30 to pass.

The plaintiff put on two former railroad brakemen, J. Russell Holden and J. D. Heritage, who had each been brakemen for the Southern Railway Company for about ten years and who testified that they were thoroughly familiar with sidings, storage tracks and derailers, yet neither of them testified that there was any custom or practice to use lights on derailers and neither of them testified that they had ever seen a light on a derailer.

There was no evidence as to any custom or practice to use lights on derailers, but on the contrary the uncontradicted evidence was, as above stated, that derailers are only used on storage tracks and that in automatic block systems lights are not used on either derailers or switches and that the accident happened in an automatic block system. Respon-

dent's Rule Book shows a place for a light on a derailler but the uncontradicted testimony was that this only applies on a signal track where there are no automatic signals, and not to a derailler in an automatic block system such as existed at Hurt, Virginia (R. 62).

Evidence as to Condition of the Track.

There was evidence that the rail opposite that on which the derailler was located had "flowed." That is, that it was worn and that slivers of iron had been picked off of both sides of the rail. There was evidence that the ballast was not flush with the top of the ties and that the ties sloped somewhat to the west or away from the derailler.

Almost all of the plaintiff's evidence was directed towards the condition of the rail opposite the derailler. Plaintiff put on two so-called experts, J. Russell Holden and J. D. Heritage, who testified, in answer to hypothetical questions, that if the jury should find the condition of the rail opposite the derailler and the roadbed as described by the witnesses it was their opinion that such condition caused the derailment, rather than the wheels of the cars striking the wrong end of the derailler.

There was no evidence that any of the rails, the derailler, or the roadbed were in any way deficient, defective or dangerous with respect to normal operations over the storage track at slow speed; that is, the movement in and out of the storage track of slowly moving equipment. There was no evidence that the running of a car over the so-called "wrong end" of the derailler was either normal or foreseeable. One of the plaintiff's so-called experts, J. Russell Holden, testified: "The use that the rail is supposed to be put to is for the wheels of the train and cars to run over those rails with the derailler off. It is a safety device altogether." (R. 40.)

The pictures of the rails, the derailler and the roadbed (Defendant's Exhibits Nos. 1 to 7, P. Supplement) and the uncontradicted evidence of continuous use of this storage track since 1936 by heavy freight trains both before and

since the accident, without any repair or alteration thereof after the accident, demonstrate that the rails, the derailler and the road-bed were in no way deficient, defective or dangerous with respect to normal operations over such storage track or that there was any foreseeable risk or danger in respect thereto.

The plaintiff offered no evidence to support its allegation that the defendant was negligent in failing to properly inspect said storage track, derailler and instrumentalities in connection therewith. On the contrary, the uncontradicted evidence on the part of the defendant was to the effect that there was proper and careful inspection of the track, rails, derailler and other instrumentalities in connection therewith, the last inspection before the accident being on the afternoon before the accident occurred (R. pp. 58 and 91-92-93).

SUMMARY OF ARGUMENT.

I.

There was no evidence of negligence on the part of respondent.

II.

The petitioner's intestate met his death solely by reason of his own negligence.

III.

The amendment of 1939 to the Federal Employers' Liability Act is not retroactive and therefore does not apply to this case.

IV.

The decision of the lower court is not based upon the doctrine of assumption of risk, but upon two other grounds entirely adequate to support it.

Since the amendment of 1939 does not apply to this case the decision of the court below can also be adequately supported on the basis of assumption of risk by petitioner's intestate.

ARGUMENT.

I.

There was no evidence of negligence on the part of respondent.

Petitioner's contentions in respect to respondent's alleged negligence are based on speculation and conjecture conclusively refuted by the evidence, from which evidence no inferences can be drawn different from those of the court below. The argument for petitioner "dwells too hard on conjecture." *Chicago Great Western R. Co. v. Rambo*, 298 U. S. 99, 102. Like the characters in *The Purloined Letter* counsel for petitioner look everywhere for the cause of the death of her intestate except where it obviously lies.

The Federal Employers' Liability Act does not undertake to define negligence, either before or since the Amendment of 1939. And what is negligence thereunder is a matter to be determined by the application of the principles of the common law, as interpreted and applied by this Court. *Southern Railway Co. v. Gray*, 241 U. S. 333; *Tiller v. Atlantic Coast Line R. Co.*, 63 S. Ct. 444, 451, in which latter case the court says: "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." A reading of the opinion of the court below clearly shows that it is not in conflict with the decisions of this Court as to the legal concept of negligence. No such conflict has been pointed

out by petitioner. On the contrary, it appears from the opinion of the court below that it relied upon and applied the same rule of law in respect to what constitutes actionable negligence as that announced by this Court, the opinion citing and quoting from *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469.

In cases of this character it is for this Court to examine the record to determine whether, as a matter of law, there is enough to sustain a finding of negligence. *Atchison, T. & S. F. R. Co. v. Saxon*, 284 U. S. 458; *Chicago Great Western R. Co. v. Rambo*, *supra*. The federal rule, and not the scintilla rule, applies in a suit in a state court under the Federal Employers' Liability Act. *Western & A. R. Co. v. Hughes*, 278 U. S. 496; *Penn. R. Co. v. Chamberlin*, 288 U. S. 333. Under this rule submission of an issue of fact to a jury is not required if there is only a scintilla of evidence, and it is the duty of the judge to direct the verdict when the testimony is such that a jury cannot properly proceed to find a verdict for the party producing it. *Atlantic Coast Line R. Co. v. Davis*, 279 U. S. 34; *Atlantic Coast Line R. Co. v. Driggers*, 279 U. S. 787.

A party claiming under the Act must in some adequate way establish negligence and causal connection between this and the injury, and conjecture is not sufficient. *Patton v. Texas, etc., R. Co.*, 179 U. S. 658; *New York Cent. R. Co. v. Ambrose*, 280 U. S. 486; *Atchison, T. & S. F. Ry. Co. v. Toops*, 281 U. S. 351; *Northwestern Pac. R. Co. v. Bobo*, 290 U. S. 499.

The decision below was entirely in accord with the uniform holdings of this Court that unsubstantial evidence, sufficient only to raise a speculation or surmise on an issue of negligence cannot support a verdict. Indeed, in the instant case the speculation and conjecture on which petitioner relies is repelled by the evidence.

In *Brennan v. Baltimore & O. R. Co.*, 115 Fed. (2d) 555, certiorari denied, 312 U. S. 685, in an action for injuries sustained by a brakeman when the car on which he was riding was derailed, evidence of negligence of the railroad

as a cause of derailment was held insufficient for the jury, in view of physical circumstances which refuted the plaintiff's testimony that he had properly performed his duty to throw the derail lever and move the derail block off the rail before giving the engineer the signal to back the car on the sidetrack on which the derailer was located. The Court also held in that case that in order to recover a railroad employee must produce substantial evidence of negligence and cannot base his case upon mere speculation.

Two so-called experts, Heritage and Holden, in answer to hypothetical questions, testified for petitioner, that in their opinion the condition of the rail opposite the derailer caused the derailment, rather than the wheels of the four cars striking the blunt or wrong end of the derailer (R. 38-39 and 46). This was the "gravamen of plaintiff's complaint", (opinion of the court below, R. supplement p. 4) and this testimony of these two witnesses was all that petitioner offered in support thereof.

The vice in the testimony of these two witnesses lies in the fact that they were both guessing or speculating. This is not only implicit in their testimony but one of them, Holden, admitted it, (R. 40) as follows:

"Q. If you take and assume that the rails on the particular track are perfectly good rails, absolutely new, the largest size, the best size and best type, a derailer of the type Mr. Hudgins described to you, on one of those rails, would you be willing to tell this jury that when you back in there under conditions described by him it would go on over every time without derailing?

A. If the cars were not moving over three or four miles an hour, I believe nine times out of ten it would.

Q. Sometimes it would derail it?

A. Possibly.

Q. So, it is just a matter of guesswork, even if the rail is good on both sides, it is just a matter of guesswork or chance as to whether or not there is a derailment—that is a fact?

A. The odds would be against it not moving any faster than that.

Q. It would be a matter of chance?

A. Yes, sir."

Although the other expert, Heritage, testified on a former trial, which resulted in a mistrial, that the condition of the rail opposite the derailer would cause the wheels of cars on that rail to drop inside the rail, or toward the derailer, (R. 49) they both testified on this trial that the defective condition of the rail opposite the derailer would cause all of the wheels on all of the trucks on all of the four cars to derail to the west, or away from the derailer (R. 39-47). The fact that this testimony was rank speculation, as well as bad guesswork, is shown by the undisputed testimony that the front trucks of the first car derailed to the west, the front trucks of the next car derailed to the east, the front trucks on the third car derailed to the west, the front trucks of the fourth car derailed to the east, and none of the other trucks of any of these four cars left the rails (R. 20-60).

Such speculation and conjecture will not support a verdict. *Patton v. Texas, etc., R. Co., supra; New York Cent. R. Co. v. Ambrose, supra.*

"If such statements are without foundation in fact, as they are on this record, they must be held to be without probative value as evidence in law. To hold otherwise would be to surrender to the tyranny of a fetishism on wholly unsubstantial grounds." *Harrison v. North Carolina R. Co.*, 194 N. C. 656, 660.

Petitioner's contention that there was no light on the derailer has already been fully met in respondent's statement of facts, showing that derailers on storage tracks in automatic block systems never have lights and that plaintiff offered no evidence to the contrary. No inference of negligence can be drawn from this, *Potter v. Atlantic Coast Line R. Co.*, 197 N. C. 17; *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, especially since Brady had a lantern; was thoroughly familiar with the location of the derailer and had operated it twice immediately before he set it in a derailing position. "No one needs notice of what he already knows." *Beaver v. China Grove*, 222 N. C. 234.

Paul Shields testified that on one occasion about three years after the derailment he saw a light on the derailer

in the daytime and that he never saw it before or since, although he lived an eighth of a mile from it. (R. 27-28-29.) This chimerical testimony is no evidence of negligence, and in so holding the state court was in accord with federal decisions. *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202; *Du Pont v. Smith*, (C. C. A. 4) 252 Fed. 491.

The petitioner contends that the respondent should have foreseen that cars would be backed against the wrong end of a derailer. The best and most complete answer to this contention will be found in the opinion of the Supreme Court of North Carolina (R. Supplement 6). We do not discuss the evidence on this point because the contention of petitioner is, at best, that the Railroad must anticipate negligence. In other words, the Railroad must take precautions against an employee doing the negligent act of running over a derailer from the wrong end. This proposition answers itself.

Petitioner's brief (p. 13) cites *Tiller v. Atlantic Coast Line R. Co.*, *supra*; *Davis v. Wolfe*, 263 U. S. 239; *Cooley v. New York Central R. Co.*, 80 Fed. (2d) 816, certiorari denied, 297 U. S. 721 and *Young v. Wheelock*, 333 Mo. 992, 64 S. W. (2d) 950, certiorari denied, 291 U. S. 676, for the proposition that the decision was contrary to the general federal law and the decisions of this Court.

In the *Tiller* case it appears that on the night of March 20, 1940, Tiller was standing between two tracks in the respondent's switch yards, tracks which allowed him three feet, seven and one-half inches of standing space when trains were moving on both sides. The night was dark and the yard was unlighted. Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track. The rear of the train which killed Tiller was unlighted although a brakeman with a lantern was riding on the back step on the side away from Tiller. The bell was ringing on the engine but both trains were moving and the Circuit Court found (128 F. 2d 420, 422) that it was

"probable that Tiller did not hear cars approaching" from behind him. No special signal of warning was given.

In *Cooley v. N. Y. Central R. Co.*, *supra*, it was held that the death of a brakeman resulting from derailment of a car by striking a derail switch could be found by the jury to have been solely and proximately caused by the negligence of another brakeman, O'Neil, in charge of the switching movement, in directing the movement against a closed switch clearly visible to him. If this had been a suit by O'Neil for injuries caused by the derailment it is manifest from the reasoning of the court that it would have directed a verdict against him on the ground that, as in the instant case, the derailment was solely and proximately caused by his negligence.

In *Davis v. Wolfe*, *supra*, a freight conductor was caused to fall from a car by reason of the loose condition of a grab iron. The loose condition of the grab iron was not disputed. This condition of the grab iron was in violation of the Safety Appliance Act and this Court affirmed a judgment for the plaintiff.

Young v. Wheelock, *supra*, was an action under the Federal Employers' Liability Act for the death of a fireman, when a train derailed in going downhill around a curve. Plaintiff offered evidence that the track at the point of derailment had between 75 and 100 rotten ties; that in many places the spikes were entirely gone, and in many other places the head of the spike was loose, being an inch or more above the plate; also that there were broken tie plates. That stepping on one end of a tie with one foot would cause the other end to strike the rail. That in going downhill around a curve with the track in this condition the train was traveling 60 miles per hour, or more. In short, this was a case of derailment of a train traveling at a high speed downhill, around a curve, upon what was just short of being no track at all.

Each of these cases was governed by its facts and neither is controlling here or in conflict with the holding below.

II.

The petitioner's intestate met his death solely by reason of his own negligence.

We deem it unnecessary to burden the Court with a repetition of the evidence upon which the lower court was quite right in holding that the petitioner's evidence points unerringly to the conclusion that the negligence of her intestate was the sole proximate cause of his injury. This evidence could support no other inference. The court fully and carefully reviewed the evidence bearing on this question and completely demonstrated that in speaking of the negligence of the deceased it did not, in any manner, mean contributory negligence, (for it had just held that respondent was not negligent) but that it meant what it said, that the injury was caused proximately by the sole negligence of the deceased.

In so holding the state court accurately and carefully appraised the evidence and correctly applied to it the rules and principles of law declared in the decisions of this court and other federal courts. *Southern Railway Co. v. Youngblood*, 286 U. S. 313; *St. Louis Southwestern R. Co. v. Simpson*, 286 U. S. 346; *Brennan v. Baltimore & O. R. Co.* *supra*; *Willis v. Penn. R. Co.*, 122 Fed. (2d) 248, 249-250, certiorari denied, 314 U. S. 684.

In the case last cited it was said:

"If the testimony of Donofrio and Myers is believed, Willis' neglect of his personal duty to act as watchman was the sole cause of his own death. In such circumstances his executrix can have no recovery under the Act. *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732; *Davis v. Kennedy*, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; *Unadilla Ry. Co. v. Caldine*, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; . . . The recent amendment, 45 USCA, Sec. 54, excluding as a defense assumption of risk, has no bearing on the rule that an employee cannot recover for injuries resulting solely from his own fault."

And in *Illinois C. R. Co. v. Skaggs*, 240 U. S. 66, 69, this Court says:

"It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; * * *"

The petition (pp. 3, 8) and supporting brief (pp. 13, 14) lay great stress on the fact that no witness testified that the deceased set the derailer on the rail of the storage track before signalling the engineer to back into that track with the end of four cars and they seem to place great reliance upon this circumstance as affording a basis for more than one inference as to whether the derailer was set by the deceased or by some other member of the train crew. Manifestly, no witness could have seen the deceased set the derailer since the petitioner's own evidence shows that there were five members of the train crew, including the deceased, and that of the other four members of the crew the engineer and fireman were more than 37 carlengths north of the derailer and the conductor and flagman were even further south of it at the time it was set. (R. 22, 23, 75, 76, 101, 102).

The petitioner says that the testimony of conductor Brandt was "not unequivocal" on the point as to whether he set the derailer. Petitioner's evidence shows that Brandt was far south of it at the time it was set and Brandt testified without contradiction: "When the cars or the train was backed into the pass track to let the northbound train pass, I threw the switch and the derailer and then came back to the crossing to await the other movement—to keep from hitting an automobile." (R. 75). Upon examination of Brandt by one of petitioner's counsel, before trial, as provided by a state statute, he was asked if someone closed the derailer. In view of what Brandt had just sworn as above quoted, petitioner's counsel evidently thought it wise not to ask him who closed it.

This crossing was about one-eighth of a mile south of the derailer (R. 25, 26). After protecting the crossing until the train backed south on the main line Brandt went still fur-

ther south of the derailler to check 12 cars on the south end of the storage track (R. 75).

The engineer, as a witness for petitioner, testified, without any contradictory evidence, that: "From the time I came out of the switch until I came back in there I never seen anybody else in there, other than Mr. Brady." (R. 25).

This evidence conclusively repels the contention of petitioner that after the freight train went north out of the storage track and before backing south on the main line, the conductor or the flagman (petitioner cannot make up her mind which) closed the switch and set the derailler on the storage track.

In an attempt to escape the uncontradicted and conclusive testimony in the trial court, showing that the deceased set the derailler, it is contended in the supporting brief (p. 3) that: "The evidence is clear and uncontradicted that on this movement north out of the pass track the deceased was on one of the four cars just behind the engine (R. 25, 75)." The pages of the record referred to show clearly that the deceased was on the cut of four cars when the train backed south on the main line and was not on them on the movement north out of the storage track. It is upon petitioner's unsupported surmise or conjecture, running counter to the record, that some member of the train crew other than her deceased set the derailler that her counsel base the contention that more than one inference could have been drawn as to whether he was simply guilty of contributory negligence, rather than sole negligence proximately causing his death.

III.

The amendment of 1939 to the Federal Employers' Liability Act is not retroactive and therefore does not apply to this case.

For the reasons and upon the authorities hereinbefore set out in respect to certiorari jurisdiction we submit that this question is not presented for the consideration of this Court.

However, if the Court goes into the matter respondent contends that the Amendment of August 11, 1939 to the "Federal Employers' Liability Act. (45 USCA Sec. 54) should not be given retroactive effect in this case.

Plaintiff's intestate died on December 25, 1938 (R.-1). This suit was started on July 26, 1939 (R.-1).

If counsel for petitioner are correct in the theory on which they contend that the Amendment of 1939 is retroactive, then for many years assumption of risk has been dead but not buried; a corpse, kept in motion by many decisions of this Court, such as *Seaboard Airline R. Co. v. Horton*, 233 U. S. 492. In view of these decisions, construing the Act as worded before the Amendment, we submit that the defense of assumption of risk was alive until that Amendment, and we do not read the opinions in the Tiller case as being obsequies over a defense, long dead, but not until then buried, but rather as holding that Congress put it to death on August 11, 1939.

In the Tiller case this Court had no occasion to pass on this question, since the accident involved in that case happened after the date of Amendment. And in *Lilly v. Grand Trunk Western R. Co.*, 63 S. Ct. 347, the court leaves the question open for future determination. *In every case in which this question has arisen, so far as we can find, it has been decided against petitioner's contention.* *Wichita Falls & S. R. Co. v. Lindley*, (Tex. Civ. App. 1940), 143 S. W. (2d) 428; *Guerriero v. Reading Co.* (1943, — Pa. —) 29 Atl. (2d) 510; *Lilly v. R. R.* (Ill. App.), 37 N. E. (2d) 888; *McCroali v. Southern Ry.*, 221 N. C. 366. Compare *Winfree v. Northern P. R. Co.*, 227 U. S. 296, in which the court held that retroactive effect will not be given to the Federal Employers' Liability Act of April 22, 1908, so as to make its provisions applicable to an alleged cause of action for death which accrued before the passage of such statute.

IV.

The decision of the lower court is not based upon the doctrine of assumption of risk, but upon two other grounds entirely adequate to support it.

The petition and brief in support thereof seek to construe the opinion of the state court as constituting a ruling as a matter of law that the conduct of the deceased amounted only to contributory negligence which it erroneously labeled as sole negligence, constituting conclusive assumption of risk. It is manifest from the opinion of the Court that its decision was in no way based upon "assumption of risk" by the deceased of any negligence of the respondent because this phrase was preceded by a distinct ruling of the Court that there was no such negligence and it was used in connection with the holding of the Court that the evidence showed that the death of the deceased was produced solely by his negligence, and it was his assumption of the risk of his sole negligence of which the Court was speaking. The concurring opinion in the Tiller case aptly expresses the sense in which the lower court used the term "assumption of risk" when it said in that opinion: "But neither is the carrier to be charged with those injuries which result from the 'usual risks' incident to employment on railroads—risks which cannot be eliminated through the carrier's exercise of reasonable care."

" 'Assumption of risk' as a defense where there is negligence has been written out of the Act. But 'assumption of risk,' in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool * * *. But until Congress chooses to abandon the concept of negligence, upon which the Act now rests, in favor of a system of workmen's compensation not dependent upon negligence, the courts cannot discard the principle expressed, in one of its senses, by the phrase 'assumption of risk', namely, that a carrier is not liable unless it was negligent."

It is manifest that when the court below spoke of "assumption of risk" it was using "a hazardous legal tool" in the sense that there can be no recovery for the death of an employee through his sole negligence.

The fact that this migratory and indiscriminate phrase "assumption of risk" was used in the opinion of the court below lends no support to petitioner's contention that it was using this phrase in the sense that it was a defense to negligence of the employer, but that it was employing the phrase in the sense that petitioner was barred conclusively by the sole negligence of her intestate.

Through sophistry and conjecture, both repelled by the record, petitioner seeks to make respondent the victim of that very tyranny of labels which this Court has just stripped from suits under the Act. The Tiller case, *supra*, having forbidden one defense from masquerading in the guise of another, lends no support to petitioner's effort to continue this practice by seeking to have this Court say that lack of negligence on the part of respondent, coupled with the death of petitioner's intestate solely through his negligence, should be held contributory negligence or assumption of risk.

V.

Since the amendment of 1939 does not apply to this case the decision of the court below can also be adequately supported on the basis of assumption of risk by petitioner's intestate.

Although the court below did not in any manner base its decision upon the defense of assumption of risk, such defense might well have been an additional sound ground for its judgment, since the Amendment of 1939 is not retroactive. Therefore, it is open to respondent to rely on this defense in support of the judgment. *Langnes v. Green*, 282 U. S. 531.

The evidence brings this case well within the margin of many decisions of this Court denying recovery under the Federal Employers' Liability Act, by reason of assumption

of risk on the part of the employee. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492; *Boldt v. Penn. R. R.*, 245 U. S. 441; *Delaware, L. & W. R. Co. v. Koske*, 279 U. S. 7.

CONCLUSION.

It is submitted that no sound grounds for certiorari are presented in the petition and brief in support thereof; that the decision below was entirely in harmony with the decisions of this Court; that the decision below was right upon the grounds upon which the court below based it and upon other grounds not passed upon; and that the petition for certiorari should be denied.

Respectfully submitted,

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H. G. HEDRICK,
Of Counsel.

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OCT 7 1943

CHARLES ELWELL CROFT

IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. 26.

IRENE BRADY, Administratrix of the Estate of EARLE A.
BRADY, Deceased, *Petitioner*.

v.

SOUTHERN RAILWAY COMPANY, *Respondent*.

BRIEF OF RESPONDENT.

SIDNEY S. ALDERMAN,
RUSSELL M. ROBINSON,
Attorneys for Respondent.

S. R. PRINCE,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. 26.

IRENE BRADY, Administratrix of the Estate of EARLE A.
BRADY, Deceased, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, *Respondent*.

BRIEF OF RESPONDENT.

OPINION BELOW.

The opinion of the Supreme Court of North Carolina is reported in 222 N. C. 367.

STATEMENT OF CASE.

This is a suit by petitioner, begun in the Superior Court of Guilford County, North Carolina, on July 26, 1939 (R. 1), to recover damages for the death of her intestate, Earle A. Brady, on December 25, 1938 (R. 2). The suit was brought under the Federal Employers' Liability Act. Issues of negligence, assumption of risk, contributory negli-

gence and damages were submitted to a jury, after motion for nonsuit by respondent was overruled. All the issues were answered for petitioner, resulting in a judgment for \$20,000.00.

On appeal the unanimous decision of the Supreme Court of the State of North Carolina was (1) that there was no evidence of negligence on the part of respondent and (2) that Brady, a brakeman, caused his death solely and proximately by reason of his negligence in setting a derailer on the rail of a storage track, at Hurt, Virginia, and then signalling the engineer to back against it with a cut of four cars, on which Brady was riding at the time they struck the derailer.

Statement of Facts.

The facts stated in petitioner's brief are insufficient for a proper understanding of the factual situation in this case. In several instances we contend that there are inaccuracies, and that many material facts have been omitted. Therefore, we deem it necessary to set forth a statement of the facts.

At the time of the death of plaintiff's intestate he was engaged in the performance of his duties as brakeman on a freight train, consisting of an engine and 37 cars, running from Spencer, North Carolina, to Monroe, Virginia. The train arrived at Hurt, Virginia, between those two points, at 5:50 A. M., and the accident occurred about 6:30 A. M. It was still dark and the deceased had a lantern with which he was giving signals to the engineer for the movement of the train.

Plaintiff's intestate was an experienced railroad man. The petitioner testified that he had been a brakeman on the railroad since 1922 and that during that time he had frequently made runs as brakeman from Spencer, North Carolina, to Monroe, Virginia, and back on both freight and passenger trains (R. 15). Hurt, Virginia, has a connection with the Virginian Railway on which connection the respondent

receives heavy deliveries of coal and northbound trains go into this storage track practically every day to pull connections and to place northbound coal thereon (R. 56 and 80). This uncontradicted testimony leads us to differ with the statement of counsel for petitioner that: "There was no evidence that the deceased was familiar with the tracks and switches at Hurt, Virginia." (Petitioner's brief p. 4.)

At the time of his death he was riding the lead end of a gondola freight car which was one of a cut of four cars being backed into the storage track. He was in charge of that movement and was giving signals by lantern to the engineer to proceed. While he was so engaged, the car upon which he was riding ran over the "wrong end" of a derailer in derailing position on said storage track. The car was derailed and Brady was thrown from it to the track and was run over and killed.

The nature and purpose of a derailer.

Derailers are in common use on all railroads. They are used on storage tracks (R. 20 and 44). Brady was thoroughly familiar with them. They are used on storage tracks where cars are parked or left without attending railroad employees. Where there is such a track, which has some downgrade sufficient to cause a loose car to roll down and into the switch and foul the main line, a derailer is put near the downgrade outlet switch of that track. Its sole purpose is to derail cars to prevent them from rolling out of the sidetrack onto the main line.

That being the purpose of a derailer, it is designed and shaped to carry out that purpose. (Defendant's Exhibit No. 1, R. 46 and 136, and Exhibit No. 2, R. 46 and 137.) Its placement is controlled by a rod leading to a handle, or lever, rather similar to a switch handle or lever. By the use of that handle or lever the derailer may be moved away from the rail so that cars may run over the rail freely. By another movement of the handle it may be put back on the rail so that it will derail cars (R. 75).

It is a large, heavy piece of iron weighing from 50 to 75 pounds, designed to rest on top of the rail. It is always placed on the outer rail of the storage track, or the rail away from the main line. It is placed near the switch outlet. The end of the derailer farthest from the switch and pointing toward the stretch of storage track on which cars will be parked is tapered. That tapered end fits quite closely to the rail and is but little above the rail. It then gradually rises to a height of about three or four inches (R. 34). As it rises from its tapered end there is a groove and a ridge leading from the inside of the rail and the inside of the derailer across the derailer and toward the outside. This is so designed that it will catch the flange of each outer wheel of the approaching cars and will carry those flanges over the outer rail so that the wheel will drop outside of that rail. The flange of the corresponding wheel at the other end of the axle is against the inner part of the opposite rail and as that wheel is pulled away from the rail it drops between the rails. Thus, the derailer is designed to derail drifting cars away from the main line so that certainly they will leave the rail before getting to the main line and certainly they will leave the rail and get on the ground away from the main line as an insurance against the dangerous fouling of the main line.

The other end of the derailer, the end nearest the switch, and frequently spoken of by the witnesses as the "wrong end" of the derailer, has no particular function or design. It is merely the end off which the derailed wheel drops. It is not tapered, but blunt, and rises quite abruptly to a height of about three or four inches (R. 34, Defendant's Exhibit No. 2, R. 46 and 137). It is not designed either to derail or to hold on the rails cars approaching from the main line. If wheels coming to this "wrong end" hit this heavy fixed obstruction they will jump and where they will land, no one can tell. Cars approaching from the main line are not supposed to run over a derailer (R. 34 and 45). The evidence on this was unanimous and uncontradicted.

J. Russell Holden and J. D. Heritage, witnesses for the plaintiff, stated that they had had many years experience as brakemen and that they had never signalled for cars to run over a derailer from the wrong end. They said that they realized the danger that would be involved in doing so and that it was the general custom to leave the derailer off until the switching operation was completed. They said that you were not supposed to run trains of any kind over derailers, either way, and that it certainly would be careless to signal the movement of a train to come over on the derailer if you know it is set on the rail and that the use that the rail is supposed to be put to is for the wheels of the train and cars to run over those rails with the derailer off, and that it is a safety device altogether (R. 34 and 45).

The track lay-out and the physical situation.

The accident occurred at Hurt, Virginia, somewhat south of the station, as shown by defendant's Exhibit No. 6 (R. 47 and 141). At this point there were four tracks. On the west there was first a track known as a house track. Next there was the southbound main line. Next there was the northbound main line. Next there was a storage track on which the accident occurred (R. 19 and 22).

At the north end of the storage track there was a switch, which was somewhat south of the Hurt station. About four car-lengths south of the switch and on the outer or eastern rail of the storage track was a derailer. There was no light on the derailer stand although there were prongs upon which a light could be placed. According to the uncontradicted testimony there are customarily and regularly no lights on derailers in an automatic block system such as the defendant had at the place in question. None of the witnesses, except Paul Shields, testified that they had ever seen a light on a derailer in an automatic block system and they testified that derailers are only used on storage tracks (R. 20, 50, 53, 54, and 75, 76). Paul Shields' testimony in this regard was confined to this particular derailer and to an

assertion that he had seen a light on this derailer *subsequent* to the fatal injury to Brady (R. 21-24).

On the storage track more than 37 car-lengths south of the derailer there were 12 cars parked (R. 17, 18). These cars were to be picked up by the train upon which Brady was brakeman. South of the derailer, between the derailer and the north end of the 12 parked cars, a public road crossed all of the tracks of the defendant at about right angles. This road crossing was about one-eighth of a mile south of the derailer (R. 22, 23).

The storage track was installed in 1936 and the rails were taken from a section of the main line. The uncontradicted testimony was to the effect that it was a "practice of the Southern Railway Company and every other railroad to use relay rails, which means to take rails out of the main line and use them in sidings and industrial tracks" (R. 57). It appears from the testimony of witness M. V. Drinkard that the rails have not been changed and that they are the same rails today that were installed in 1936 (R. 50). The rail opposite the derailer bore a date mark of 1912.

The uncontradicted evidence is that the heaviest engines, weighing 350,000 pounds, have been in and out of this storage track practically every day with a large number of freight cars from 1936 until the time of trial in 1942, and that there has been no change or repair of the rails, cross-ties, derailer or any other part of the track since the accident on December 25, 1938 (R. 51, 56 and 80).

The track at the point in question was gauged on the afternoon before the accident and immediately following the accident, and the track gauge showed both times that the track gauged the exact required or standard gauge width of four feet eight and one-half inches (R. 50, 51 and 77).

The movements of the train.

The train in question was a Southern Railway Freight Train from Spencer, North Carolina, to Monroe, Virginia. It had an engine, 37 cars and a caboose. It arrived at Hurt,

Virginia, about 5:50 A. M., on December 25, 1938. The accident occurred between 6:20 and 6:30 A. M., on said day. At the time of the accident and at all times prior thereto it was dark and signals were given by lantern. When the freight train pulled into Hurt it had orders to go on the storage track to let northbound passenger train No. 30 pass and then pick up the 12 empty cars. Those cars were destined for Lynchburg, Virginia. The freight train had four empty cars also destined for Lynchburg, Virginia, which were attached at the front end of the train next to the engine. Therefore, the proposed movement was to let No. 30 pass and then switch the 12 cars from the pass (storage) track into the freight train between the four cars destined for Lynchburg and the remainder of the train. This proposed movement was explained to the train crew by the conductor (R. 62).

Between the north end of the 12 parked cars and the derailer there was sufficient room to place the whole freight train of 37 cars (R. 62).

As its first movement the freight train, which had pulled up on the main line north of the switch, backed into the storage track. After some wait, No. 30 passed going north.

As its second movement, the freight train pulled out of the storage track and on the main line north of the switch.

As its third movement, the freight train backed on the main line to a point where the engine was south of the switch leading into the storage track. On this movement the engine backed far enough south to clear the public road, above mentioned, which crossed the tracks about one eighth of a mile south of the derailer. The train stopped there. The coupling between the fourth car back of the engine and the remainder of the train was uncoupled by Brady (R. 18, 21 and 63).

As its fourth movement, the engine and four cars headed north and pulled up so that the rear end of the fourth car was north of the switch leading into the storage track.

As its fifth movement, the engine and four cars backed into the storage track. Brady was riding on the lead end of the first of these four cars, the southeastern corner of that car, or the corner on the side of the engineer and on the side of the switch stand and on the side of the derailer and the derailer stand. Brady had a lantern and had signalled the engineer with it to come back into the storage track with the cut of four cars (R. 18).

At this time the derailer was on the rail or set to derail cars which might roll out of the track. When the lead end of the car on which Brady was riding struck the wrong end of the derailer it was moving about three or four miles an hour. The uncontradicted testimony shows that the four cars derailed, the leading truck on each car as it backed into the siding having derailed. The front truck on the car on the south end, that is the lead end, had derailed to the west. The leading or front truck on the second car had derailed to the east. The leading or front truck on the third car had derailed to the west. The leading or front truck on the car next to the engine had derailed to the east. None of the trucks of the four cars except the front trucks of each of them derailed or came off the track (R. 19, 51 and 70).

The positions and movements of the personnel.

The freight train in question was manned by five men: the engineer, Woodson; the fireman, Dorsett; the brakeman, Brady; the flagman, Scruggs; and the conductor, Brandt. There was nobody else in the crew (R. 17).

The Conductor: Just before the first movement of the freight train from the northbound main line track into the storage track, the conductor opened the switch leading into the storage track and removed the derailer from the outside rail of the storage track. Then the conductor went back about one-eighth of a mile to protect the highway crossing and remained there until the train came out of the storage track and backed down the main track again on its third

movement. On that third movement the conductor rode the caboose from the highway crossing down to the end of that movement and then went across to the storage track, south of the highway crossing, to inspect the 12 cars which his train was going to pick up. He continued that inspection and remained at those 12 cars, some 75 car-lengths south of the derailler, until after the accident. Upon signal from the engineer immediately following the accident he came forward from those 12 cars to the scene of the accident (R. 19, 62, 63, 64, 83, 85, 86).

The Flagman: The flagman, E. C. Scruggs, stayed in the caboose until after No. 30 passed. He then went back to flag anything that might approach from the south and to take the brakes off of the 12 cars which were to be picked up. He did not touch either the switch or the derailler and he got off the caboose while the train was in the storage track and went south to flag and to take off brakes (R. 19, 83, 84, 85, 86). He was so engaged at all times until the time of the accident. After the accident and upon signal from the engineer, he went forward or north from the 12 cars to the scene of the accident (R. 19, 85, 86).

The Fireman: The fireman, A. L. Dorsett, at all times during the several movements of the train was on his seat box on the left-hand side of the cab, on the western side of the engine. He was on the side away from the storage track, the switch and the derailler. He was on the side away from Brady who was giving signals to the engineer to enter or leave the storage track (R. 18 and 83).

The Engineer: The engineer, L. O. Woodson, at all times during the several movements of the train was on his seat box in the cab of the engine on the right side, the eastern side of the engine. He was on the same side of the storage track as were the switch, the derailler and Brady, who was giving signals to enter or leave the storage track (R. 17 and 83).

The Brakeman: Earle A. Brady, plaintiff's intestate, was the brakeman. After the train had moved into the storage track to await the passing of No. 30, Brady closed the switch and also put the derailler back on the rail (R. 21). After No. 30 passed Brady removed the derailler from the rail and opened the switch and signalled the engineer to come back out on the main line (R. 21). After the train had moved out on the main line as its second movement and back down the main line and passed the highway crossing as its third movement Brady uncoupled the coupling between the fourth and fifth cars back of the engine. Brady was on these four cars and the engineer saw him get off of them at the time that he uncoupled them from the rest of the train south of the crossing (R. 21). Brady rode back north on these four cars until he got north of the switch. He got off the car, threw the switch then got back on and signalled the engineer. The plaintiff's witness, L. O. Woodson, testified to the foregoing without any contradiction and also testified that "from the time I came out of the switch until I came back in there I never seen anybody else in there, other than Mr. Brady." (R. 21).

Brady caught the lead end of the fourth car and when it passed over the derailler he was thrown off and killed. Those movements of Brady are unquestioned. Although there is no direct evidence from any person who actually saw Brady close the switch to permit the train to back up on the main line as its third movement (and this is the time when he must have put the derailler back on the rail), the location of every other member of the train crew was accounted for as above set out. The inevitable conclusion is that Brady put the derailler on the rail after the train had come out of the storage track and failed to take it off the rail before he signalled the engineer to come back into the storage track from the main line with the four cars. The plaintiff offered no evidence tending to show that any person other than Mr. Brady touched, or was anywhere near, the switch or the derailler, after the conductor first opened

the switch and removed the derailler to let the freight train into the storage track for No. 30 to pass.

The plaintiff put on two former railroad brakeman, J. Russell Holden and J. D. Heritage, who had each been brakeman for the Southern Railway Company for about ten years and who testified that they were thoroughly familiar with sidings, storage tracks and deraillers, yet neither of them testified that there was any custom or practice to use lights on deraillers and neither of them testified that they had ever seen a light on a derailler.

There was no evidence as to any custom or practice to use lights on deraillers, but on the contrary the uncontradicted evidence was, as above stated, that deraillers are only used on storage tracks and that in automatic block systems lights are not used on either deraillers or switches and that the accident happened in an automatic block system. Respondent's Rule Book shows a place for a light on a derailler but the uncontradicted testimony was that this only applies on a signal track where there are no automatic signals, and not to a derailler in an automatic block system such as existed at Hurt, Virginia (R. 53).

Evidence as to condition of the track.

There was evidence that the rail opposite that on which the derailler was located had "flowed." That is, that it was worn and that slivers of iron had been picked off of both sides of the rail. There was evidence that the ballast was not flush with the top of the ties and that the ties sloped somewhat to the west or away from the derailler.

Almost all of the plaintiff's evidence was directed towards the condition of the rail opposite the derailler. Plaintiff put on two so-called experts, J. Russell Holden and J. D. Heritage, who testified, in answer to hypothetical questions, that if the jury should find the condition of the rail opposite the derailler and the roadbed to be as described by the witnesses it was their opinion that such condition caused the derailment, rather than the wheels of the cars striking the wrong end of the derailler.

There was no evidence that any of the rails, the derailer, or the roadbed were in any way deficient, defective or dangerous with respect to normal operations over the storage track at slow speed; that is, the movement in and out of the storage track of slowly moving equipment. There was no evidence that the running of a car over the so-called "wrong end" of the derailer was either normal or foreseeable. One of the plaintiff's so-called experts, J. Russell Holden, testified: "The use that the rail is supposed to be put to is for the wheels of the train and cars to run over those rails with the derailer off. It is a safety device altogether." (R. 34).

The pictures of the rails, the derailer and the roadbed (Defendant's Exhibits Nos. 1 to 7, R. 45, 46, 47-136, 137, 138, 139, 140, 141, 142) and the uncontradicted evidence of continuous use of this storage track since 1936 by heavy freight trains both before and since the accident, without any repair or alteration thereof after the accident, demonstrate that the rails, the derailer and the roadbed were in no way deficient, defective or dangerous with respect to normal operations over such storage track or that there was any foreseeable risk or danger in respect thereto.

The plaintiff offered no evidence to support its allegation that the defendant was negligent in failing to properly inspect said storage track, derailer and instrumentalities in connection therewith. On the contrary, the uncontradicted evidence on the part of the defendant was to the effect that there was proper and careful inspection of the track, rails, derailer and other instrumentalities in connection therewith, the last inspection before the accident being on the afternoon before the accident occurred (R. 49 and 76, 77).

SUMMARY OF ARGUMENT.

I.

THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF RESPONDENT.

II.

THE PETITIONER'S INTESTATE MET HIS DEATH SOLELY BY REASON OF HIS OWN NEGLIGENCE.

III.

NO QUESTION AS TO THE EFFECT OF THE 1939 AMENDMENT TO THE FEDERAL EMPLOYERS' LIABILITY ACT UPON ASSUMPTION OF RISK HAS BEEN RAISED BY PETITIONER IN A TIMELY AND ADEQUATE MANNER AND THE DECISION OF THE LOWER COURT WAS NOT BASED UPON ASSUMPTION OF RISK, BUT UPON OTHER DISTINCT GROUNDS ENTIRELY ADEQUATE TO SUPPORT IT.

IV.

THE AMENDMENT OF 1939 TO THE FEDERAL EMPLOYERS' LIABILITY ACT IS NOT RETROACTIVE AND THEREFORE DOES NOT APPLY TO THIS CASE.

V.

SINCE THE AMENDMENT OF 1939 DOES NOT APPLY TO THIS CASE THE DECISION OF THE COURT BELOW CAN ALSO BE ADEQUATELY SUPPORTED ON THE BASIS OF ASSUMPTION OF RISK BY PETITIONER'S INTESTATE.

ARGUMENT.

I.

THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF RESPONDENT.

Petitioner's contentions in respect to respondent's alleged negligence are based on speculation and conjecture conclusively refuted by the evidence, from which evidence no inferences can be drawn different from those of the court below. The argument for petitioner "dwells too hard on conjecture." *Chicago Great Western R. Co. v. Rambo*, 298 U. S. 99, 102. Counsel for petitioner look everywhere for the cause of the death of her intestate except where it obviously lies, the act of petitioner's intestate in placing the derailler on the rail, or his failure to remove it therefrom, before signalling the engineer to back the locomotive and four cars into the passing track.

The Federal Employers' Liability Act does not undertake to define negligence, either before or since the Amendment of 1939. And what is negligence thereunder is a matter to be determined by the application of the principles of the common law, as interpreted and applied by this Court. *Southern Railway Co. v. Gray*, 241 U. S. 333; *Tiller v. Atlantic Coast Line R. Co.*, 63 S. Ct. 444, 451, in which latter case the court says: "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." A reading of the opinion of the court below clearly shows that it is not in conflict with the decisions of this Court as to the legal concept of negligence. No such conflict has been pointed out by petitioner. On the contrary, it appears from the opinion of the court below that it relied upon and applied the same rule of law in respect to what constitutes ac-

tionable negligence as that announced by this Court, the opinion citing and quoting from *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469.

In cases of this character it is for this Court to examine the record to determine whether, as a matter of law, there is enough evidence to sustain a finding of negligence. *Atchison, T. & S. F. R. Co. v. Saxon*, 284 U. S. 458; *Chicago Great Western R. Co. v. Rambo*, *supra*. The federal rule and not the scintilla rule, applies in a suit in a state court under the Federal Employers' Liability Act. *Western & A. R. Co. v. Hughes*, 278 U. S. 496; *Penn. R. Co. v. Chamberlain*, 288 U. S. 333. Under this rule submission of an issue of fact to a jury is not required if there is only a scintilla of evidence, and it is the duty of the judge to direct the verdict when the testimony is such that a jury cannot properly proceed to find a verdict for the party producing it. *Atlantic Coast Line R. Co. v. Davis*, 279 U. S. 34; *Atlantic Coast Line R. Co. v. Driggers*, 279 U. S. 787; *Galloway v. United States*, 63 S. Ct. 1077, 1086.

A party claiming under the Act must in some adequate way establish negligence and causal connection between this and the injury, and conjecture is not sufficient. *Patton v. Texas & P. R. Co.*, 179 U. S. 658; *New York Cent. R. Co. v. Ambrose*, 280 U. S. 486; *Atchison, T. & S. F. Ry. Co. v. Toops*, 281 U. S. 351; *Northwestern Pac. R. Co. v. Bobo*, 290 U. S. 499.

The decision below was entirely in accord with the uniform holdings of this Court that unsubstantial evidence, sufficient only to raise a speculation or surmise on an issue of negligence, cannot support a verdict. Indeed, in the instant case the speculation and conjecture on which petitioner relies is repelled by the physical facts in evidence.

In *Brennan v. Baltimore & O. R. Co.*, 115 Fed. (2d) 555, certiorari denied, 312 U. S. 685, in an action for injuries sustained by a brakeman when the car on which he was riding was derailed, evidence of negligence of the railroad as a cause of derailment was held insufficient for the jury.

in view of physical circumstances which refuted the plaintiff's testimony that he had properly performed his duty to throw the derail lever and move the derail block off the rail before giving the engineer the signal to back the car on the sidetrack on which the derailer was located. The Court also held in that case that, in order to recover, a railroad employee must produce substantial evidence of negligence and cannot base his case upon mere speculation.

Two so-called experts, Heritage and Holden, in answer to hypothetical questions, testified for petitioner, that in their opinion the condition of the rail opposite the derailer caused the derailment, rather than the wheels of the four cars striking the blunt or wrong end of the derailer (R. 32, 33, and 39). This was the "gravamen of plaintiff's complaint", (opinion of the court below, R. 128) and this testimony of these two witnesses was all that petitioner offered in support thereof.

Heritage testified (R. 44) that the defective condition of the rail would have to play a part in widening the gauge of the track to accomplish the result he mentioned. Yet the uncontradicted testimony was that the standard width of a track between rails is 4 feet 8½ inches (R. 50) and that the track at the derailer was gauged exactly at that width on the day before the accident (R. 50, 51) and again on the morning after the accident (R. 77).

No witness testified that he had seen a train hit the wrong end of a derailer with a defective or worn rail opposite it. In none of the instances about which Ashby or Holden testified did they say that any of the rails were bad.

The vice in the testimony of Heritage and Holden lies in the fact that they were both guessing or speculating and that the speculation of their opinion evidence was contrary to the undisputed physical facts in evidence. This is not only implicit in their testimony but one of them, Holden, admitted the guesswork in his testimony (R. 34), as follows:

Q. If you take and assume that the rails on the particular track are perfectly good rails, absolutely

new, the largest size, the best size and best type, a derailer of the type Mr. Hudgins described to you, on one of those rails, would you be willing to tell this jury that when you back in there under conditions described by him it would go on over every time without derailling?

A. If the cars were not moving over three or four miles an hour, I believe nine times out of ten it would.

Q. Sometimes it would derail it?

A. Possibly.

Q. So, it is just a matter of guesswork, even if the rail is good on both sides, it is just a matter of guesswork or chance as to whether or not there is a derailment—that is a fact?

A. The odds would be against it not moving any faster than that.

Q. It would be a matter of chance?

A. Yes, sir."

Although the other expert, Heritage, testified on a former trial, which resulted in a mistrial, that the condition of the rail opposite the derailer would cause the wheels of cars on that rail to drop inside the rail; or toward the derailer (R. 42), they both testified on this trial that the defective condition of the rail opposite the derailer would cause all of the wheels on all of the trucks on all of the four cars to derail to the west, or away from the derailer (R. 33 and 40). The fact that this testimony was rank speculation, as well as bad guesswork, is shown by the undisputed testimony that the front trucks of the first car derailed to the west, the front trucks of the next car derailed to the east, the front trucks on the third car derailed to the west, the front trucks of the fourth car derailed to the east, and none of the other trucks of any of these four cars left the rails (R. 19, 51 and 70).

Such speculation and conjecture will not support a verdict. *Patton v. Texas & P. R. Co. supra*; *New York Cent. R. Co. v. Ambrose, supra*.

"If such statements are without foundation in fact, as they are on this record, they must be held to be without probative value as evidence in law. To hold otherwise

would be to surrender to the tyranny of a fetishism on wholly unsubstantial grounds." *Harrison v. North Carolina R. Co.*, 194 N. C. 656, 660.

For the foregoing reasons and under the principle announced in *United States v. Johnson*, 63 S. Ct. 1233, 1241, and *Galloway v. United States*, 63 S. Ct. 1077, 1085, 1090, the respondent contended in the court below (R. 119 and 121), and now contends, in support of the judgment (*Langnes v. Green*, 282 U. S. 531), that the testimony of these so-called expert witnesses should not have been given consideration, although the court below, after doing so, arrived at a correct result.

Petitioner's contention that there was no light on the derailer has already been fully met in respondent's statement of facts, showing that derailers on storage tracks in automatic block systems never have lights and that plaintiff offered no evidence to the contrary. No inference of negligence can be drawn from this, *Potter v. Atlantic Coast Line R. Co.*, 197 N. C. 17; *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, especially since Brady had a lantern, was thoroughly familiar with the location of the derailer and had operated it twice immediately before he finally set it in the derailing position which caused the derailment and his death. "No one needs notice of what he already knows." *Beaver v. China Grove*, 222 N. C. 234.

Paul Shields testified that on one occasion about three years after the derailment he saw a light on the derailer in the daytime and that he never saw it before or since, although he lived an eighth of a mile from it. (R. 23, 24). This chimerical testimony is no evidence of negligence, and in so holding the state court was in accord with federal decisions. *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202; *Dupont de Nemours & Co. v. Smith* (C. C. A. 4), 252 Fed. 491.

The petitioner contends that the respondent should have foreseen that cars would be backed against the wrong end of a derailer. The best and most complete answer to this contention will be found in the opinion of the Supreme

Court of North Carolina. We do not discuss the evidence on this point because the contention of petitioner is, at best, that the railroad must anticipate negligence. In other words, the railroad must take precautions against an employee doing the negligent act of running over a derailer from the wrong end. This proposition answers itself.

Petitioner's brief (p. 7) cites *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. —, 87 L. Ed. (Advance Opinions) 446, 63 S. Ct. 444; *Davis v. Wolfe*, 263 U. S. 239, 68 L. Ed. 284, 44 S. Ct. 64; *Cooley v. New York Central R. Co.* (C. C. A. 2d 1936), 80 F. (2d) 816, cert. den. 297 U. S. 721, 80 L. Ed. 1005, 56 S. Ct. 599; *Young v. Wheelock*, 333 Mo. 992, 64 S. W. (2d) 950, cert. den. 291 U. S. 676, 78 L. Ed. 1064, 54 S. Ct. 527; *Bailey v. Central Vermont R. Co.* — U. S. —, 87 L. Ed. (Advance Opinions) 1030, 63 S. Ct. 1067; *Owens v. Union Pacific R. Co.* — U. S. —, 87 L. Ed. (Advance Opinions) 1221, 63 S. Ct. 1271; *Seago v. New York Central R. Co.*, 315 U. S. 781, 86 L. Ed. 1188, 62 S. Ct. 806; *Lilly v. Grand Trunk Western R. Co.*, — U. S. —, 87 L. Ed. (Advance Opinions), 323, 63 S. Ct. 347, for the proposition that the decision below was contrary to the general federal law and to the decisions of this Court.

The *Tiller Case* lays down no new test for determining whether negligence has been shown. In that case it appears that on the night of March 20, 1940, Tiller was standing between two tracks in the respondent's switch yards, tracks which allowed him three feet, seven and one-half inches of standing space when trains were moving on both sides. The night was dark and the yard was unlighted. Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track. The rear of the train which killed Tiller was unlighted although a brakeman with a lantern was riding on the back step on the side away from Tiller. The bell was ringing on the engine but both trains were moving and the Circuit Court found (128 Fed. 420,

422) that it was "probable that Tiller did not hear cars approaching" from behind him. No special signal of warning was given.

In *Cooley v. N. Y. Central R. Co.*, *supra*, it was held that the death of a brakeman resulting from derailment of a car by striking a derail switch could be found by the jury to have been solely and proximately caused by the negligence of another brakeman, O'Neil, in charge of the switching movement, in directing the movement against a closed switch clearly visible to him. If this had been a suit by O'Neil for injuries caused by the derailment it is manifest from the reasoning of the court that it would have directed a verdict against him on the ground that, as in the instant case, the derailment was solely and proximately caused by his own negligence.

In both *Davis v. Wolfe*, *supra*, and the *Lilly Case*, there was ample uncontradicted evidence of violation of the Safety Appliance Act, which was, of course, sufficient without further proof of negligence.

Young v. Wheelock, *supra*, was an action under the Federal Employers' Liability Act for the death of a fireman, when a train derailed in going downhill around a curve. Plaintiff offered evidence that the track at the point of derailment had between 75 and 100 rotten ties; that in many places the spikes were entirely gone, and in many other places the head of the spike was loose, being an inch or more above the plate; also that there were broken tie plates; that stepping on one end of a tie with one foot would cause the other end to strike the rail; that in going downhill around a curve with the track in this condition the train was traveling 60 miles per hour, or more. In short, this was a case of derailment of a train traveling at a high speed downhill, around a curve, upon what was just short of being no track at all.

In the *Bailey Case* the Supreme Court of Vermont reversed a judgment for the plaintiff, by a divided vote, thus

indicating, as this Court held, that it was a close or doubtful case where fair-minded men might reach different conclusions. In the present case the decision of the Supreme Court of North Carolina was unanimous after a careful and painstaking review of the evidence.

In the *Bailey Case* there was positive evidence of negligence of the defendant in failing to furnish a safe place to work, sufficient to carry the case to the jury in respect to negligence and proximate cause, without indulging in conjecture or speculation.

"Bailey certainly was unskilled and perhaps unfamiliar in the opening of hopper cars." On the contrary Brady was an experienced brakeman, having served as such for 22 years, frequently over the very run on which he was killed.

The hopper car and equipment in the *Bailey Case* were being handled by Bailey in the very manner intended by the defendant, under dangerous conditions arising from its negligence and not through any negligence on the part of Bailey, whereas in the present case the track and equipment of the defendant were safe and adequate for normal and expected use, but were being put to an unusual, extraordinary, negligent and unforeseeable use through the sole negligence of Brady in closing the derailer and then signaling the cut of cars against it.

In the *Owens Case* this Court held that where the evidence is such that the jury may find from the facts either assumption of risk by the employee, or merely contributory negligence on his part, it should be left to the jury to determine the matter. Nothing is said in that case to support plaintiff's contention that a jury should say whether her intestate caused his death by his own act when the evidence permits no other inference. Plaintiff seeks comfort from the *Owens* case on the unfounded contention that Brady's conduct constituted, at most, "negative negligence," upon the assumption that he did not set the derailer, but here again the undisputed facts repel this assumption, for they

show conclusively that Brady was the only person who could have set the derailler on the rail and that his conduct in setting the derailler and then causing the cut of cars to back against it was positive negligence, which was the sole cause of his death. This defeats recovery upon a ground clearly and distinctly separate from any element of assumption of risk or contributory negligence, with which the *Owens Case* dealt. And for the same reason no question of the "primary duty rule" is open for debate. *Seago v. New York Central R. Co. supra*, reverses a judgment on the ground that there was sufficient evidence of negligence for submission to the jury. No facts are stated and no cases are cited in the per curiam opinion in that case.

Each of these cases was governed by its facts and none of them is controlling here or in conflict with the holding below.

II.

THE PETITIONER'S INTESTATE MET HIS DEATH SOLELY BY REASON OF HIS OWN NEGLIGENCE.

We deem it unnecessary to burden the Court with a repetition of the evidence upon which the lower court was quite right in holding that the petitioner's evidence points unerringly to the conclusion that the negligence of her intestate was the sole proximate cause of his injury. This evidence could support no other inference. The court fully and carefully reviewed the evidence bearing on this question and completely demonstrated that in speaking of the negligence of the deceased it did not, in any manner, mean contributory negligence (for it had just held that respondent was not negligent) but that it meant what it said, that the death was caused proximately by the sole negligence of the deceased.

In so holding the state court accurately and carefully appraised the evidence and correctly applied to it the rules and principles of law declared in the decisions of this Court and other federal courts. *Southern Railway Co. v. Young-*

blood, 286 U. S. 313; *Atlantic Coast Line R. Co. v. Davis*, 279 U. S. 34; *St. Louis Southwestern R. Co. v. Simpson*, 286 U. S. 346; *Brennan v. Baltimore & O. R. Co. supra*; *Willis v. Penn. R. Co.*, 122 Fed. (2d) 248, 249, 250, certiorari denied, 314 U. S. 684.

In the case last cited it was said:

"If the testimony of Donofrio and Myers is believed, Willis' neglect of his personal duty to act as watchman was the sole cause of his own death. In such circumstances his executrix can have no recovery under the Act. *Great Northern Ry. v. Wiles*, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732; *Davis v. Kennedy*, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; *Unadilla Ry. Co. v. Caldine*, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; * * * The recent amendment, 45 USCA, Sec. 54, excluding as a defense assumption of risk, has no bearing on the rule that an employee cannot recover for injuries resulting solely from his own fault."

And in *Illinois C. R. Co. v. Skaggs*, 240 U. S. 66, 69, this court says:

"It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; * * *"

To the same effect see also *Missouri P. R. Co. v. Guy* (1942), 203 Ark. 166, 157 S. W. (2d) 11, certiorari dismissed, 63 S. Ct. 22.

The petitioner's brief lays great stress on the fact that no witness testified expressly that the deceased set the derailer on the rail of the storage track before signalling the engineer to back into that track with the cut of four cars and seems to place great reliance upon this circumstance as affording a basis for more than one inference as to whether the derailer was set by the deceased or by some other member of the train crew. Manifestly, no witness could have seen the deceased set the derailer since the petitioner's own evidence shows it was dark and that there were five members of the train crew, including the deceased, and that, of

the other four members of the crew, the engineer and fireman were more than 37 car-lengths north of the derailer and the conductor and flagman were even further south of it at the time it was set.

Under these circumstances we cannot see any "hazard" to the plaintiff in asking any of the other members of the train crew if Brady reset the derailer, or that defendant "carefully refrained" from asking this question. (Petitioner's Brief, p. 12.) All of the surviving members of the train crew were available to plaintiff and were examined by plaintiff.

The petitioner says that the testimony of Conductor Brandt was "not unequivocal" on the point as to whether he set the derailer. Petitioner's evidence shows that Brandt was far south of it at the time it was set and Brandt testified without contradiction: "When the cars or the train was backed into the pass track to let the northbound train pass, I threw the switch and the derailer and then came back to the crossing to await the other movement—to keep from hitting an automobile." (R. 63). Upon examination of Brandt by one of petitioner's counsel, before trial (R. 62), as provided by a state statute, he was asked if someone closed the derailer (R. 62). In view of what Brandt had just sworn as above quoted, petitioner's counsel evidently thought it wise not to ask him who closed it.

This highway crossing was about one-eighth of a mile south of the derailer (R. 22). After protecting the crossing until the train backed south on the main line Brandt went still further south to check 12 cars on the south end of the storage track south of the highway crossing (R. 63).

The uncontradicted testimony of the flagman (R. 85, 86) shows that he got off the train before it started out of the passing track, to flag anything that might be coming from the south, and that he was down there and didn't know anything about what was done when the train came out of the passing track.

The engineer, as a witness for petitioner, testified, without any contradictory evidence, that: "From the time I came out of the switch until I came back in there I never seen anybody else in there, other than Mr. Brady." (R. 21).

This evidence conclusively repels the contention of petitioner that after the freight train went north out of the storage track and before backing south on the main line, the conductor or the flagman (petitioner cannot make up her mind which) closed the switch and set the derailer on the storage track. The evidence is conclusive that Brady himself set the derailer on the track.

In an attempt to escape the uncontradicted and conclusive testimony in the trial court, showing that the deceased set the derailer, it is contended in petitioner's brief (pp. 4, 13) that on the movement north out of the pass track the deceased was on one of the four cars just behind the engine. The pages of the record referred to by petitioner (R. 21, 63 and 83) clearly show that the deceased was on the cut of four cars when the train backed south on the main line, after the derailer was set, and was not on the movement north out of the storage track.

In petitioner's brief (pp. 13, 14) reference is made to the testimony of I. M. Scruggs (R. 80), who was not a member of the train crew in this case, in an effort to support the contention that the conductor or flagman reset the derailer when the train came out of the pass track. It will be seen that this witness was speaking of the general practice on a local freight with a crew of six men, including two brakemen (R. 82). There were five members of the train crew in this case and Brady was the only brakeman. The uncontradicted testimony shows that Brady was in charge of the derailer and switch for the movement of the train in and out of the pass track. Petitioner offered no testimony to show that it was the duty of any other member of the train crew to handle the derailer, although she put on the stand Heritage and Holden, both of whom had had ten years experience as brakemen.

It is upon petitioner's unsupported surmise or conjecture, running counter to the record, that some member of the train crew other than her deceased set the derailer, that her counsel base the contention that more than one inference could have been drawn as to whether he was simply guilty of contributory negligence, rather than sole negligence proximately causing his death. "Inference is capable of bridging many gaps. But not in these circumstances, one so wide and deep as this." *Galloway v. United States, supra.*

III.

NO QUESTION AS TO THE EFFECT OF THE 1939 AMENDMENT TO THE FEDERAL EMPLOYERS' LIABILITY ACT UPON ASSUMPTION OF RISK HAS BEEN RAISED BY PETITIONER IN A TIMELY AND ADEQUATE MANNER AND THE DECISION OF THE LOWER COURT WAS NOT BASED UPON ASSUMPTION OF RISK, BUT UPON OTHER DISTINCT GROUNDS ENTIRELY ADEQUATE TO SUPPORT IT.

At no time and in no manner did petitioner, either in the trial court or in the court below, set up or claim any immunity from respondent's defense of assumption of risk either under the Act or under the Amendment of 1939.

As stated by the court below "The case was fought out on grounds selected by the plaintiff." Upon the trial an issue on assumption of risk was submitted to the jury without objection or exception by the petitioner. State rules of practice and procedure govern in an action in the state court under the Federal Employers' Liability Act. *Central Vermont R. Co. v. White*, 238 U. S. 507; *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310; *Fleming v. Norfolk Southern R. Co.*, 160 N. C. 196; *Batton v. A. C. L. R. Co.*, 212 N. C. 256, certiorari denied, 303 U. S. 651. In the North Carolina courts a party cannot complain of an issue submitted to the jury where he does not except and submit

other issues. *Drennan v. Wilkes*, 179 N. C. 512; *Exum v. Chase*, 180 N. C. 95.

A thorough search of the record has failed to reveal to us that by the pleadings, evidence, admissions, or in any other manner did the petitioner make any contention in the trial court that the Amendment of 1939 was retroactive so as to eliminate assumption of risk as a defense in the case. On the contrary all of the issues submitted to the jury were fought out on the merits, it being unquestioned that assumption of risk was a defense in a proper case, but it being contended by counsel for petitioner, both in the trial court and in the lower court, only that the deceased had not assumed the risk under the facts of the case.

Petitioner should not now be heard to complain, for the first time, of a ruling of the lower court on a point of which her counsel were fully apprized, but did not contest, either in the trial court or in the court below; the point being that the Amendment does not apply to causes of action accruing prior to its enactment.

Upon the foregoing facts there was no timely raising of a federal question in respect to whether the Amendment was retroactive. *Montana v. Rice*, 204 U. S. 291; *Atlantic Coast Line R. Co. v. Mims*, 242 U. S. 532; *Lynch v. New York*, 293 U. S. 52; *Honeyman v. Hannan*, 300 U. S. 14; *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U. S. 206.

In respondent's brief on appeal to the Supreme Court of North Carolina it raised, among others, the points (1) that the plaintiff was barred by her intestate's assumption of risk and (2) that the Amendment of 1939 should not be given retroactive effect to eliminate this defense. Counsel for petitioner in their brief on appeal, filed sometime thereafter, naturally combatted the first proposition, but did not take issue in any way with the second proposition to the effect that said Amendment was not retroactive; nor did they so contend in any manner. In short, the petitioner made no contention either in the trial court or in the Supreme Court of North Carolina that the Amendment of

1939 was retroactive and eliminated the defense of assumption of risk from this antecedent cause of action. Therefore *Home Insurance Co. v. Dick*, 281 U. S. 397, and *Gant v. Oklahoma City*, 289 U. S. 98, relied on by petitioner, have no application; since in both of those cases the question was raised in the state appellate court by the appellant.

The Supreme Court of North Carolina did not pass upon the question of assumption of risk or on the question of whether the Amendment of 1939 to the Federal Employers' Liability Act was retroactive. It said:

"* * * Hence having himself handled the derailor, and having neglected to place it open for this last movement of cars, as it was his duty to do, he would be conclusively deemed to have assumed the risk of an injury which was caused by his own act or omission. *Southern Ry. Co. v. Youngblood*, 286 U. S. 313; *Unadilla Valley Ry. v. Caldine*, 278 U. S. 139, 73 L. Ed. 224 (note). And his negligence in this respect would be regarded as the sole proximate cause of his injury. *Powers v. Sternberg*, 213 N. C. 41, 195 S. E. 88; *Butner v. Spease*, supra; *Jeffries v. Powell*, 221 N. C. 415. The amendment of 1939 to the Federal Employers' Liability Act is inapplicable here. *McCrowell v. R. R.* 221 N. C. 366 (377)." (R. 133).

It is our contention that when the court below said that the deceased would be conclusively deemed to have assumed the risk of an injury, it was not using the term "assumed the risk" in the same sense as in the doctrine of "assumption of risk" referred to in the statute and the amendment thereof. *Southern Ry. Co. v. Youngblood* and *Unadilla Valley Ry. v. Caldine*, cited by the court in support of this statement, do not deal with assumption of risk but only with the negligence of the employee as the sole proximate cause of injury. Furthermore, when the court below said that the Amendment of 1939 to the Federal Employers' Liability Act was inapplicable, it was not holding the Amendment inapplicable because not retroactive; it was merely stating that the Amendment had no place in this case, whether

retroactive or not. This appears to us necessarily so because the court had just held, and throughout its decision held, that the deceased's negligence "would be regarded as the sole proximate cause of his injury."

Moreover, the opinion of the lower court being fully and adequately (and we say solely) based on grounds relating in no way to the doctrine of assumption of risk or to the question of whether the Amendment of 1939 should be retroactively applied, that question is not before this Court.

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that judgment as rendered could not have been given without deciding it. *Lynch v. New York*, 293 U. S. 52; *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U. S. 206; *Owens v. Union Pacific R. Co. supra*.

The petitioner's brief seeks to construe the opinion of the state court as constituting a ruling as a matter of law that the conduct of the deceased amounted only to contributory negligence which it erroneously labeled sole negligence, constituting conclusive assumption of risk. It is manifest from the opinion of the court that its decision was in no way based upon "assumption of risk" by the deceased of any negligence of the respondent because this phrase was preceded by a distinct ruling of the court that there was no such negligence of the respondent and it was used in connection with the holding of the court that the evidence showed that the death of the deceased was produced solely by his own negligence, and it was his assumption of the risk of his sole negligence of which the court was speaking. The concurring opinion in the *Tiller Case* aptly expresses the sense in which the lower court used the term "assumption of risk" when it said in that opinion: "But neither is the

carrier to be charged with those injuries which result from the 'usual risks' incident to employment on railroads—risks which cannot be eliminated through the carrier's exercise of reasonable care."

" 'Assumption of risk' as a defense where there is negligence has been written out of the Act. But 'assumption of risk', in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool * * *. But until Congress chooses to abandon the concept of negligence, upon which the Act now rests, in favor of a system of workmen's compensation not dependent upon negligence, the courts cannot discard the principle expressed, in one of its senses, by the phrase 'assumption of risk', namely, that a carrier is not liable unless it was negligent." (Ibid.)

It is manifest that when the court below spoke of "assumption of risk" it was using "a hazardous legal tool" in the sense that there can be no recovery for the death of an employee through his sole negligence.

The fact that this migratory and indiscriminate phrase "assumption of risk" was used in the opinion of the court below lends no support to petitioner's contention that it was using this phrase in the sense that it was a defense to negligence of the employer. It is obvious that it was employing the phrase in the sense that petitioner was barred conclusively by the sole negligence of her intestate.

Through sophistry and conjecture, both repelled by the record, petitioner seeks to make respondent the victim of that very tyranny of labels which this Court has just stripped from suits under the Act. The *Tiller Case*, *supra*, having forbidden one defense from masquerading in the guise of another, lends no support to petitioner's effort to continue this practice by seeking to have this Court say that lack of negligence on the part of respondent, coupled with the death of petitioner's intestate solely through his own

negligence, should be held contributory negligence or assumption of risk.

It is quite plain that in this case the petitioner is earnestly seeking to get a decision of this Court to the effect, as stated in the dissenting opinion in *Bailey v. Central Vermont R. Co.*, 87 Law ed. (Adv.) 1030, 1035, "that, as Congress has seen fit not to enact a workmen's compensation law, this Court will strain the law of negligence to accord compensation where the employer is without fault."

IV.

THE AMENDMENT OF 1939 TO THE FEDERAL EMPLOYERS' LIABILITY ACT IS NOT RETROACTIVE AND THEREFORE DOES NOT APPLY TO THIS CASE.

For the reasons and upon the authorities hereinbefore set out we submit that this question is not presented for the consideration of this Court:

However, if the Court goes into the matter respondent contends that the Amendment of August 11, 1939 to the Federal Employers' Liability Act (45 USCA Sec. 54) should not be given retroactive effect to apply to this case.

Plaintiff's intestate died on December 25, 1938 (R. 1). This suit was started on July 26, 1939 (R. 1). The Amendment was approved August 11, 1939.

If counsel for petitioner are correct in the theory on which they contend that the Amendment of 1939 is retroactive, then for many years assumption of risk has been dead but not buried; a corpse, kept in motion by many decisions of this Court, such as *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492. In view of these decisions, construing the Act as worded before the Amendment, we submit that the defense of assumption of risk was alive until that Amendment, and we do not read the opinions in the *Tiller Case* as being obsequies over a defense, long dead, but not until then buried, but rather as holding that Congress put it to death on August 11, 1939.

In the *Tiller Case*, this Court did not overrule previous decisions applying the doctrine of assumption of risk, such as *Toledo, etc., R. Co. v. Allen*, 276 U. S. 165. The opinion in the *Tiller Case* pointed out that in the legislative history of the Amendment of August 11, 1939, there was criticism of the doctrine of the *Allen Case*, and this Court held that by the Amendment Congress abolished the doctrine of that case. This clearly implies that Congress recognized that such decisions were the law prior to the Amendment. It took the Amendment to change the law, and it was to change the law, rather than to overrule previous decisions of this Court as erroneous, that Congress passed the Amendment.

When this Court overrules its previous decisions, it does so on the theory that those decisions were wrong under the law when made, and such a holding obviously has a retroactive aspect. But, when Congress, by amendment to the statute, changes the law, it recognizes the law as it existed up until the time of the amendment, but exercises its legislative power to change the law from that time on.

In the *Tiller Case* this Court had no occasion to pass on this question, since the accident involved in that case happened after the date of amendment. In the *Lilly Case* and in the *Owens Case* the Court leaves the question open for future determination. *In every case in which this question has arisen, so far as we can find, it has been decided against petitioner's contention.* *Wichita Falls & S. R. Co. v. Lindley* (Tex. Civ. App. 1940), 143 S. W. (2d) 428; *Guerriero v. Reading Co.* (1943, — Pa. —), 29 Atl. (2d) 510; *Lilly v. Grand Trunk Western R. Co.* (Ill. App.), 37 N. E. (2d) 888; *McCrowell v. Southern Ry.*, 221 N. C. 366. And see *Winfree v. Northern P. R. Co.*, 227 U. S. 296, in which the Court held that retroactive effect would not be given to the Federal Employers' Liability Act of April 22, 1908, so as to make its provisions applicable to an alleged cause of action for death which accrued before the passage of such statute.

V.

SINCE THE AMENDMENT OF 1939 DOES NOT APPLY TO THIS CASE THE DECISION OF THE COURT BELOW CAN ALSO BE ADEQUATELY SUPPORTED ON THE BASIS OF ASSUMPTION OF RISK BY PETITIONER'S INTESTATE.

Although the court below did not in any manner base its decision upon the defense of assumption of risk, such defense might well have been an additional sound ground for its judgment, since the Amendment of 1939 is not retroactive. Therefore, it is open to respondent to rely on this defense in support of the judgment. *Langnes v. Green*, 282 U. S. 531.

The evidence clearly shows that the deceased knew of and accepted the risk in the conditions and situation which brought about his injury and brings this case well within the margin of many decisions of this Court denying recovery under the Federal Employers' Liability Act, by reason of assumption of risk on the part of the employee. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492; *Boldt v. Penn. R. R.*, 245 U. S. 441; *Delaware, L. & W. R. Co. v. Koske*, 279 U. S. 7; *Owens v. Union Pacific R. Co.*, *supra*.

CONCLUSION.

It is submitted that the decision below was in harmony with the decisions of this Court; that it was right upon the grounds upon which the court below based it and upon other grounds not passed upon; and that it should be affirmed. This respondent had several strong assignments of error entitling it to a new trial, which were not considered by the Supreme Court of North Carolina, since it disposed of the case on other grounds. *Seago v. New York Central R. Co.*, 315 U. S. 781; *Owens v. Union Pacific R. Co.*, *supra*. Therefore, in no event, could this Court reverse the decision of the Supreme Court of North Carolina outright

and direct affirmance of the judgment of the trial court in favor of petitioner, as prayed by petitioner.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1942

No. 830

23

IRENE BRADY, Administratrix of the Estate of
EARLE A. BRADY, Deceased,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent

**PETITION TO REHEAR, MOTION TO VACATE ORDER
DENYING CERTIORARI, AND ACCOMPANYING STATE-
MENT AND BRIEF OF PETITIONER IN SUPPORT THERE-
OF—FILED IN CONNECTION WITH PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF NORTH CAROLINA.**

JULIUS C. SMITH,
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C. CLIFFORD FRAZIER,
D. E. HUDGINS,
WELCH JORDAN,
Of Counsel

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IN THE
Supreme Court of The United States

OCTOBER TERM, 1942

No. 830

IRENE BRADY, ADMINISTRATRIX OF THE
ESTATE OF EARLE A. BRADY, DECEASED,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION TO REHEAR, MOTION TO VACATE
ORDER DENYING CERTIORARI, AND ACCOM-
PANYING STATEMENT AND BRIEF OF PETI-
TIONER IN SUPPORT THEREOF—FILED IN
CONNECTION WITH PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF
THE STATE OF NORTH CAROLINA.

TO THE HONORABLE THE SUPREME COURT OF THE
UNITED STATES:

PART I. PETITION TO REHEAR AND MOTION TO VA-
CATE ORDER DENYING CERTIORARI.

The petitioner hereby respectfully petitions this Court to rehear this case and moves that this Court reconsider its action in denying, upon limited and qualified grounds, the petitioner's request for a writ of certiorari to review a judgment of the Supreme Court of the State of North Carolina, and that this Court vacate such order. The petitioner expressly renews her request for the writ of certiorari. A certificate of counsel in support of this petition to rehear has been filed with the Clerk and is printed in Appendix I.

PART II. STATEMENT AND BRIEF OF PETITIONER

(1) Introductory Statement

On the 15th day of March, 1943, the petitioner filed with this Court her petition for a writ of certiorari to the Supreme Court of the State of North Carolina. The supporting brief was combined with the petition (Rule 38, Sec. 2). The petition and brief were filed within the required time (Record Supplement: Certificate of Clerk of North Carolina Supreme Court). The combined petition and brief, together with the record, were served upon respondent, which in due course filed its brief in opposition to the petition. A reply brief was filed by the petitioner. On April 19, 1943, this Court entered the following order with respect to this case:

"The petition for writ of certiorari is denied on the ground that it does not appear from the record or from the papers submitted that the judgment is final. Mr. Justice Black is of opinion that the judgment is final."

A reasonable construction of the foregoing language clearly indicates that this Court is of the opinion that if the judgment which the petitioner seeks to review is final (as required by Judicial Code, Section 237 (b), amended, 28 USCA, Sec. 344), the certiorari jurisdiction of this Court should be exercised. Accordingly, this petition to rehear, motion to vacate, and supplemental statement of petitioner is filed for the sole purpose of demonstrating conclusively to this Court that the judgment of the court below is in fact final, and that, therefore, for the reasons stated in the original petition and supporting briefs, this Court should now exercise its jurisdiction to grant the requested writ.

(2) Judgment Is Final Under North Carolina Law and Finality Is Apparent On Face of Judgment

The judgment (Record Supplement) which the petitioner seeks to review provides: ". . . It is, therefore, considered and adjudged by the Court here, that the opinion of the Court . . . be certified to the said Superior Court, to the intent that the *Judgment is Reversed.*" (Italics supplied).

The opinion of the North Carolina Supreme Court (Record Supplement, page 10) closes with the following sentence: "After careful consideration, we reach the conclusion that defendant's motion for judgment of nonsuit should have been allowed, and that the judgment of the Superior Court must be Reversed."

In the present case the North Carolina Supreme Court itself could have entered the last judgment or could have instructed the trial court to do so, *Rutherford Hospital v. Florence Mills*, 186 N. C. 554, 120 S. E. 212. In actual practice, it followed its standard, routine custom of sending the case to the trial court for the perfunctory entry of a non-discretionary and compulsory decree, which merely implemented the final action taken by the appellate court. (Appendix II). The North Carolina practice is clearly stated in the case of *North Carolina Corporation Commission v. Atlantic Coast Line R. Co.*, 137 N. C. 1 (pp. 20-21), 49 S. E. 191 (p. 199), in the following language:

"The Court has the power to enter final judgment here, and on proper occasions has done so. The Code, sec. 957; *Alspaugh v. Winstead*, 79 N. C., 526; *Griffin v. Light Co.*, 111 N. C., 438; *Cook v. Bank*, 130 N. C., 184. Final judgment has been entered here, not infrequently, by order and without opinion as a matter of course. In *Bernhardt v. Brown*, 118 N. C., 710, 36 L.R.A., 402, it is said: 'If this Court reverses or affirms the judgment below, it may in its discretion enter a final judgment here or direct it to be so entered below. By preference, and as a matter of convenience, the latter course is, unless in very exceptional cases, the course pursued, especially since the Act of 1887 Chap. 192.' In *Caldwell v. Wilson*, 121 N. C., 473, which resembles this case in being a matter of public interest and not a judgment for money, it was held 'the judgment must therefore be affirmed, but in view of the public interests involved, we deem it proper not to remand the case but to enter final judgment in this Court', which was done—ousting the defendant from the office and seating the relator."

The Superior Court has no power to modify or change a

judgment or decree of the Supreme Court of North Carolina which is certified to the trial court. The power of the trial court is confined to incidental matters of detail necessary to carry the decree into effect, and the judgment of the appellate court "must be treated as final and conclusive in the whole course of the action, and not subject to review or correction by the court below." *Murrill v. Murrill*, 90 N. C. 120 (at p. 124). The procedure is based upon the desire to have the last judgments in cases of this type entered by the court where the original and official records are preserved, i.e., the trial court. In no case in North Carolina (Appendices II and III) is there any provision for, or practice in respect to, certifying back to the North Carolina Supreme Court the record of an implementing judgment entered by the lower court pursuant to the mandate of the appellate court. Therefore, it was and is impossible for the petitioner to obtain from the North Carolina Supreme Court any certification of any judgment entered subsequent in date to the actual final judgment of the North Carolina Supreme Court.

It is a fundamental principle of North Carolina procedure that a judgment of nonsuit is a final disposition of the case in which it is entered. The plaintiff is barred from proceeding further in such action. *Tussey v. Owen*, 147 N. C. 335, 61 S. E. 180; *Hampton v. Rex Spinning Company*, 198 N. C. 235, 151 S. E. 266; *Cooper v. Crisco*, 201 N. C. 739 (at p. 742), 161 S. E. 310 (at p. 312). In *Tussey v. Owen*, *supra*, it was held that upon reversal of a judgment for the plaintiff because of insufficiency of the evidence, the Superior Court was bound to dismiss the action in accordance with the mandate of the final judgment in the appellate court. The trial court possessed no further power to perform any judicial act in the action under review.

The petitioner regards the case of *North Carolina R. Co. v. Story*, 268 U. S. 288, 69 L. ed. 959, 45 S. Ct. 531, as direct authority in support of her contention that the judgment of the Supreme Court of the State of North Carolina appears on its face to be a final decree. It is an interesting coinci-

dence that *North Carolina R. Co. v. Story* was before this Court on a writ of certiorari to the Supreme Court of North Carolina to review a judgment affirming a judgment of the Superior Court of Guilford County. In discussing the question of finality of the judgment of the North Carolina Supreme Court Mr. Chief Justice Taft said (at pp. 291, 292 of the U. S. Report): "The affirmance of the judgment of the lower court upon the certified opinion of the supreme court, *left nothing for the Guilford county court to do but to dismiss the petition . . . Such a decree is a final decree . . .* we must assume from the action of the supreme court, and the recital of what was before it, that it intended the Guilford county court, on the coming down of its mandate, to terminate the case by following its opinion." (Italics supplied.) In the instant case the judgment of the North Carolina Supreme Court (to paraphrase the language of Mr. Chief Justice Taft) left nothing for the Guilford county court to do but to dismiss the action. (See Appendix IV). Hence, it is submitted that the decision in the *Story case* should be treated as controlling, and this Court should hold that the judgment of the appellate court below is final in form and substance so as to give jurisdiction to this Court. The judgment of the Supreme Court of North Carolina meets the test of finality defined in the decisions of this Court. *Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44, 60 L. ed. 136, 36 S. Ct. 5. As was said by Mr. Justice Van Devanter in the *Rio Grande Western R. Co. case*, speaking of a decree of the Supreme Court of Utah which reversed a decree of a county court in favor of defendant and directed entry of judgment for the plaintiff, "It disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the discretion of the trial court . . . it being final in the sense of Section 237 [Judicial Code]. . . ." (at p. 47 of the U. S. Report).

In view of the well established rule of this Court to the effect that finality must be determined from the face of the judgment (*Hartford Accident & Indemnity Co. v. Bunn*, 285

U. S. 169, 76 L. ed. 685, 52 S. Ct. 354; *Haseltine vs. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 S. Ct. 49), and since under the North Carolina law the procedure supplementing the court's judgment is purely ministerial in character, the petitioner did not deem it necessary to cover this question in her original petition and briefs. The pertinent North Carolina statutes governing the appellate powers of the North Carolina Supreme Court are Sections 658, 659, 1412 and 1417 of the North Carolina Consolidated Statutes of 1919, Michie's 1939 Code. (Appendix III). These statutes conclusively indicate that the judgment in the present case was final, and that the trial court's action upon the North Carolina Supreme Court's decision was ministerial only.

Since this supplemental statement of the petitioner is informal in nature and does not purport to constitute an official record — the official record being limited, of course, to the proceedings in the North Carolina Supreme Court — the petitioner has attached hereto (Appendix IV) an exact copy of the judgment which was in fact entered in this case in the North Carolina trial court upon the opinion and judgment of the North Carolina Supreme Court. This document is printed herein only for the purpose of aiding this Court to determine that the judgment of the North Carolina Supreme Court is final and is the proper subject of review by certiorari. (Judicial Code, Section 237 (b); 28 USCA, Sec. 344.) The original certified copy of the judgment which appears herein as Appendix IV has been filed in this Court with the Clerk.

The *Haseltine case*, *supra*, contains the following significant observation: "The plaintiffs in the case under consideration could have secured an immediate review by this court, *if the court as a part of its judgment of reversal had ordered the circuit court to dismiss their petition . . .*" (Italics supplied.) In the present case, the ministerial judgment (Appendix IV) entered by the trial court upon the State Supreme Court's mandate expressly provided for *dismissal* of the action, with the result that the *only* remedy available to the plaintiff is her petition to this Court for a writ of certiorari to the North Carolina Supreme Court.

(3) Respondent Has Never Contested Finality of Judgment

It will be observed from a study of respondent's brief that the respondent has never raised the issue that the judgment of the North Carolina Supreme Court was interlocutory or fragmentary. On the contrary, the contention of the respondent (as illustrated by Appendix IV) is that the case is finally terminated. Respondent would never concede that under the judgment of the North Carolina Supreme Court the petitioner is entitled to a new trial or that any further proceedings, other than the ministerial dismissal of the action by the trial court, are proper. In fact the question of the finality of the judgment probably never occurred to the respondent until this Court entered its order in this case on April 19, 1943. The judgment is a typical final decree under the laws of the State of North Carolina, and no North Carolina lawyer or judge would ever contend that any further steps are required to conclude the case, except for the routine and required entry by the trial court of the final judgment of dismissal. (Appendix II).

(4) Supplemental Certificate of Clerk of the North Carolina Supreme Court Establishes Finality of Judgment

There is printed with this petition, motion, and statement (Appendix II) a certificate of Adrian J. Newton, Clerk of the North Carolina Supreme Court. This certificate clearly demonstrates that the judgment which the petitioner seeks to review is final, and that, therefore, this Court may properly exercise certiorari jurisdiction in this case. The original of the supplemental certificate has been filed with the Clerk of this Court.

(5) Time Element Does Not Preclude Issuance of Writ of Certiorari

As indicated above, the petition in this case was filed in ample time. 28 USCA, Sec. 350. It follows that this Court, upon this petition to rehear, may reconsider and revise its order as issued in this case on April 19, 1943. The case is still

before this Court, and the Court possesses adequate power to grant the request of the petitioner, particularly in the light of the facts disclosed in this statement.

(6) Conclusion

For the reasons stated in her original petitions and briefs, and for the additional reasons set forth in this petition and motion, petitioner respectfully submits that this Court should grant this petition to rehear, vacate its order of April 19, 1943, and issue a writ of certiorari to review the decision and judgment of the North Carolina Supreme Court denying to the petitioner rights which have been guaranteed to her under the Federal Employers' Liability Act, as amended, 45 USCA, Sections 51-54.

Respectfully submitted,

JULIUS C. SMITH,
Greensboro, North Carolina,
Counsel for Petitioner.

C. CLIFFORD FRAZIER,
D. E. HUDGINS,
WELCH JORDAN,
Of Counsel.

APPENDIX I
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942
No. 830

<p>IRENE BRADY, ADMINISTRATRIX OF THE ESTATE OF EARLE A. BRADY, DECEASED, <i>Petitioner,</i></p> <p style="text-align: center;">versus</p> <p>SOUTHERN RAILWAY COMPANY, <i>Respondent.</i></p>

CERTIFICATE OF COUNSEL

I, Julius C. Smith, Counsel for petitioner, make this certificate in compliance with Rule No. 33 of the Revised Rules of the Supreme Court of the United States (effective February 27, 1939), in connection with the petition to rehear and motion of petitioner to vacate the order of this Court entered herein on April 19, 1943, as follows:

"The petition for writ of certiorari is denied on the ground that it does not appear from the record or from the papers submitted that the judgment is final. Mr. Justice Black is of opinion that the judgment is final."

I do hereby certify that said petition to rehear is presented in good faith and not for delay, and that, in my opinion, said petition for rehearing should be granted and said order of April 19, 1943 vacated to the end that a writ of certiorari may be issued to the Supreme Court of the State of North Carolina.

IN WITNESS WHEREOF, I have hereunto set my hand on this the 23rd day of April, 1943.

(s) JULIUS C. SMITH,
Counsel for Petitioner.

APPENDIX II

IN THE
SUPREME COURT OF THE STATE OF
NORTH CAROLINAIRENE BRADY, ADMINISTRATRIX OF THE ESTATE
OF EARLE A. BRADY, DECEASED

v.

SOUTHERN RAILWAY COMPANY

Appeal docketed 3 August, 1942

Case argued 2 December, 1942

Opinion filed 16 December, 1942

Final Judgment entered 16 December, 1942

Record certified to United States Supreme Court
10 March, 1943

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify that the judgment entered on the 16th day of December, 1942, by the Supreme Court of North Carolina in the case of Irene Brady, Administratrix of the Estate of Earle A. Brady, Deceased, v: Southern Railway Company (said judgment having been entered pursuant to opinion filed on December 16, 1942, in this court in connection with said case) was and is a final judgment under the laws of the State of North Carolina, and that pursuant to the laws of said State it became the mandatory and ministerial duty of the Superior Court of Guilford County, North Carolina, to enter judgment dismissing and terminating said action. I further certify that the record in the above entitled case, as heretofore certified by me on the 10th day of March, 1943, was and is the full and complete record on file in the Supreme Court of North Carolina with respect to said case, there being no provision of the laws of the State of North Carolina for.

recording in the Supreme Court of said State of judgments entered in the Superior Courts of the State pursuant to opinions and judgments of the Supreme Court of North Carolina.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at office in Raleigh, North Carolina, on this the 22nd day of April, 1943.

(s) ADRIAN J. NEWTON,
*Clerk of the Supreme
Court of North Carolina.*

(Official Seal of the
Supreme Court of the
State of North Carolina.)

APPENDIX III

NORTH CAROLINA STATUTES

- (a) Section 658 of North Carolina Consolidated Statutes of 1919 (Michie's Code, 1939).
 - (b) Section 659 of North Carolina Consolidated Statutes of 1919 (Michie's Code, 1939).
 - (c) Section 1412 of North Carolina Consolidated Statutes of 1919 (Michie's Code, 1939).
 - (d) Section 1417 of North Carolina Consolidated Statutes of 1919 (Michie's Code, 1939).
-

- (a) Section 658. *Judgment on appeal and on undertakings; restitution.*—Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the supreme court on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment is rendered against the appellant or person prosecuting the writ.
- (b) Section 659. *Procedure after determination of appeal.*—In civil cases, at the first term of the superior court after a certificate of the determination of an appeal is received,

if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first term after the receipt of the certificate from the supreme court.

(c) *Section 1412. Power to render judgment and issue execution.*—In every case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon; and it may at its discretion make the writs of execution which it may issue returnable either to the said court or to the superior court: Provided, that when an execution shall be made returnable as last mentioned, a certificate of the final judgment of the supreme court shall always be transmitted to the superior court aforesaid, and there be recorded: Provided further, that the said superior court may enforce obedience to the execution, and in the event of its not being executed may issue new or further execution or process thereon in the same manner as though the first execution had issued from the said superior court: Provided, also, that in criminal cases the decision of the supreme court shall be certified to the superior court from which the case was transmitted, which superior court shall proceed to judgment and sentence agreeable to the decision of the supreme court and the laws of the state.

(d) *Section 1417. Certificates to superior courts; execution for costs; penalty.*—The clerk on the first Monday in each month shall transmit by some safe hand, or by mail, to the clerks of the superior courts certificates of the decisions of the supreme court in cases sent from such courts, which shall have been on file ten days; and thereupon the clerks respectively shall issue execution for the costs incurred in the courts from which the cases were sent; and the clerk of the supreme court shall issue exe-

cution for the costs incurred in that court, including all publications in newspapers made in the progress of the cause in that court, and by order of the same, and all postage on letters which concern the transfer of original papers. And if the clerk shall fail for the space of twenty days to perform the duty herein enjoined of transmitting the certificates of decisions, he shall forfeit and pay to the party or parties in whose favor the supreme court shall have decided, one hundred dollars.

APPENDIX IV

NORTH CAROLINA, IN THE SUPERIOR COURT,
 GUILFORD COUNTY. JANUARY 5, 1943, CIVIL TERM.

IRENE BRADY, ADMINISTRATRIX OF THE
 ESTATE OF EARLE A. BRADY, DECEASED,

Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY,

Defendant.

Judgment Pursuant to Certificate of Decision of Supreme Court.

This cause coming on to be heard and being heard by the Honorable Wm. H. Bobbitt, Judge Presiding, at the January 5, 1943 Civil Term of the Superior Court of Guilford County, and it appearing to the Court that the certificate of the opinion and judgment of the Supreme Court of North Carolina in this cause has been duly received and filed in the office of the Clerk of this Court, from which it appears that a judgment heretofore rendered in this cause in favor of the plaintiff and against the defendant in the sum of \$20,000.00 and costs, at the March 30, 1942 Civil Term of the Superior Court of Guilford County, North Carolina, was reversed on the ground that the defendant's motion for judgment of nonsuit should have been allowed:

IT IS, THEREUPON, CONSIDERED, ORDERED AND ADJUDGED That in conformity with the said opinion and judgment of the Supreme Court of North Carolina, the aforesaid judgment in favor of the plaintiff and against the defendant, Southern Railway Company, in the sum of \$20,000.00 and costs, be and the same is hereby set aside and vacated; that this action be and the same is hereby nonsuited and dismissed and that the plaintiff be taxed with the costs of said action.

This 15th day of January, 1943.

(s) WM. H. BOBBITT,

Judge Presiding.

To the signing of the foregoing judgment the plaintiff in apt time and in open court objects and excepts, and gives notice of intention to petition the Supreme Court of the United States for a writ of certiorari to the Supreme Court of North Carolina to review a decision and judgment reversing a judgment of the Superior Court of Guilford County in favor of the plaintiff herein.

This the 15th day of January, 1943.

(s) WM. H. BOBBITT,

Judge Presiding.

I, J. P. Shore, Clerk of the Superior Court of Guilford County, North Carolina, do hereby certify that the foregoing is a true, correct, accurate and complete copy of judgment, and accompanying notation, filed in my office on the 15th day of January, 1943, and now of record therein, in connection with the case of Irene Brady, Administratrix of the estate of Earle A. Brady, deceased, vs. Southern Railway Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office on this the 22 day of April, 1943.

(s) J. P. SHORE,

*Clerk of the Guilford County
Superior Court.*

(Official Seal of the
Clerk of the Superior
Court of Guilford County,
North Carolina.)

SUPREME COURT OF THE UNITED STATES.

No. 26.—OCTOBER TERM, 1943.

Irene Brady, Administratrix of the
Estate of Earle A. Brady, De-
ceased, Petitioner,
vs.
Southern Railway Company.

On Writ of Certiorari to the
Supreme Court of the State
of North Carolina.

[December 20, 1943.]

Mr. Justice REED delivered the opinion of the Court.

This case arose under the Federal Employers' Liability Act.¹ Certiorari to the Supreme Court of North Carolina was sought and granted to consider the retroactivity of the last amendment to the Act in conjunction with the contention that there was error in the ruling which held the case improperly submitted to the jury by the trial court. 319 U. S. 777. Our conclusion makes it unnecessary to consider the former problem.

The decedent, Earle A. Brady, was a brakeman. At the time of his death he was employed in that capacity in interstate commerce by the respondent, Southern Railway Company. The accident occurred during a switching movement in Virginia. The freight train upon which decedent was acting as brakeman came north over a main line and passed a switch which led into a storage track running south parallel to and on the east of the main line. There were four other members of the crew—the engineer, the fireman, the flagman and the conductor.

After the entire train passed the switch, it was stopped and backed into the storage track to permit another northbound train to go through on the main line and to pick up twelve cars at the south end of the storage track. After the other train passed, decedent's train, without picking up the storage track cars, pulled out on to the main line, backed southwardly beyond a vehicular grade crossing which passed over the main line and the storage track about one-eighth of a mile south of the switchpoints, left

¹ 35 Stat. 65, as amended; 36 Stat. 291; and 53 Stat. 1404.

the caboose and all the cars except the four nearest the engine on the main line and returned north for the purpose of again backing into the storage track to pick up the storage track cars. After coupling these cars on to the four next to the engine, the intended movement was to pull out again on the main line, back the train southwardly to the cars left on the main line, couple up all the cars and proceed on the journey to the north.

As the engine and four cars backed slowly into the storage track, the decedent was riding the southeastern step of the rear car, a gondola. It was 6:30 A. M. on Christmas morning and so dark the work was carried on by lantern signals. The trucks hit the wrong end of a derailer, located three or four car lengths from the switch, which was closed so as to prevent cars on the storage track from drifting accidentally onto the main line.² The contact derailed the cars and threw decedent to instant death under the wheels.

Damages were sought for the alleged negligence of the carrier in failing to furnish a reasonably safe place to work by reason of defects in the track and derailer and, we assume since it was submitted to the jury and passed upon by the Supreme Court of North Carolina, 222 N. C. at 370, by the act of some other employee in improperly closing the derailer after the beginning and before the fatal phase of the switching movement. Further there was a charge of negligence in failing to provide a light or other warning to indicate the dangerous position of the derailer. A judgment for \$20,000 was obtained in the Superior Court which was reversed in the state Supreme Court on the ground of the failure of the evidence to support the jury's verdict.

There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a

² A derailer is a small but heavy iron device attached to a rail which opens and closes over the rail by a lever, so as to derail or turn off the track cars approaching the closed derailer from the expected direction. When the derailer is open trains may pass in either direction without interference. A train or car approaching a closed derailer from the unexpected or wrong direction may successfully roll over the obstruction but more probably they, too, would be derailed. The apparatus is not designed when closed to safely permit the passage of cars from the unexpected direction.

uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states. *Western & Atlantic R. R. v. Hughes*, 278 U. S. 496, 498; *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 474. Cf. *United Gas Co. v. Texas*, 303 U. S. 123, 143. It is true that this Court has held that a state need not provide in F. E. L. A. cases any trial by jury according to the requirements of the Seventh Amendment. *Minneapolis & St. L. R. R. Co. v. Bombolis*, 241 U. S. 211. But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. R. v. Hughes*, *supra*; *Baltimore & Ohio R. R. Co. v. Groeger*, 226 U. S. 521, 524. Cf. *Gunning v. Cooley*, 281 U. S. 90, 94; *Commissioners v. Clark*, 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway v. United States*, 319 U. S. 372; *Pence v. United States*, 316 U. S. 332; *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, n. 1; *Anderson, Admr. v. Smith*, 226 U. S. 439; *Coughran v. Bigelow*, 164 U. S. 301, 307; *Gunning v. Cooley*, 281 U. S. 90, 93, note; *Seaboard Air Line v. Padgett*, 236 U. S. 668, 673; *Parke v. Ross*, 11 How. 362, 373. See IX Wigmore on Evidence, (3d ed., 1940), §§ 2494 *et seq.*

An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury for the decedent's estate based upon reason is of no doctrinal importance. Every case varies. However, the soundness of the judgment entered in the state Supreme Court depends upon an appraisal of the evidence and, as to this, there is a difference of opinion here. Our conclusion is that there is failure to show in the record any negligence of the carrier from not putting a light on the derailer or by the action of other employees than decedent in closing the derailer.

As to the light, it is nowhere shown that it was customary or even desirable in the operation of this or any other railroad to equip derailleurs with such a signal. Apparently lights on a derailler are not used on storage tracks where, as at the place of the accident, an automatic block system functions.

Nor do we find any evidence upon which a jury could find negligence of other employees of the carrier in setting the derailler without warning the decedent. On the first backward movement into the storage track, the engineer and fireman were in the engine cab at the front of the train. There is no evidence that either left that position until after the accident. As the entire train passed the derailler then without incident and again upon its exit from the storage track to return to the main line to cut the train, there is no suggestion that the derailler was not open during that part of the movement. As petitioner states, "during switching operations it is the usual rule and custom for the derailler to be kept off the track until the switching operation is completed." This time the switch was closed between the movement just referred to and the return of the engine and four cars to the storage track to pick up the cars waiting transportation.

The evidence shows without contrary intimation that on the first movement into the storage track the twelve cars to be picked up later were south of the crossing and therefore more than an eighth of a mile from the switch. "When the cars or the train was backed into the pass track to let the northbound train pass, I [the conductor] threw the switch and the derailler and then came back to the crossing to await the other movement—to keep from hitting an automobile." "When that movement was made—when they backed out on the main line—I was at this crossing, protecting the crossing. In the backing up movement I protected the crossing and then they cut out the four cars. The engine came over the crossing; cut off somewhere five or six cars south of the crossing. I was not up north of the engine when they cut the cars out. I was back up here. I rode the caboose car back. When they came on down I stayed on the caboose car and Mr. Brady stayed where the four or five cars were. He cut those out. I didn't see him. I was checking on those cars. I had left the caboose. I was not far from those twelve cars so

I left the caboose to check up on the cars. While I was over there I heard the blast of the locomotive engine. I didn't see how the cars were derailed—left the track—nor did I see where Mr. Brady was at that time." Obviously the conductor, in order to get near the twelve stored cars, hopped the caboose at the crossing as it backed up on the main line. The flagman testified that the conductor came back and watched the crossing after the train first backed into the storage track. The flagman also testified that on leaving the caboose after the second train passed he, the flagman, went south to check up on the twelve stored cars and never touched either the switch or the derailer.

The undisputed testimony as to the significant movements of the decedent, Brady, as given by the engineer, follows:

"When we backed into the pass or storage track the first time and got in there to wait for No. 30 to go by, I saw Mr. Brady close the switch and the derailer. Mr. Brady gave me the signal to come back out. He set the derailer not to derail and opened the switch for me to come out and I came on out. Then I pulled out and back down south on the northbound track beyond the crossing. Mr. Brady was on the four cars and I saw him get off these four cars. He rode back north on these four cars 'til he got north of the switch. He got off the car and threwed the switch and got back and signaled me back. From the time I came out of the switch until I came back in there I never seen anybody else in there, other than Mr. Brady."

With the record evidence as to the action of the crew in this condition, it appears obvious that there is nothing to show negligence by any of the other servants of the carrier.

We now turn to the third instance of alleged negligence. This is the existence to the knowledge of the carrier of a rail, opposite the derailer, so worn on top and sides that in the opinion of qualified experts it permitted the thrust of the east wheels of the car, as they rose over the "wrong end" of the derailer, to force the flange on the west wheels over the defective rail and so to derail the cars, when no such derailment would have occurred, "nine times out of ten, if the best type" rail was in use. There is no evidence of the unsuitability of the rail for ordinary use.

Such evidence, we assume, would justify a finding for petitioners, if the defective rail was the proximate cause of the derailment and the backing of the train improperly over the

closed derailer a danger reasonably to be anticipated. As to the likelihood of cars passing over the wrong end of derailleurs, one witness with ten years experience as a brakeman testified that he recalled three or four instances. Another, the Superintendent of the railroad with 22 years experience said, "It happens very frequently. I would say yes, I have seen it 25 to 50 times." The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. *Atchison, T. & S. F. Ry. v. Toops*, 281 U. S. 351; *St. Louis-San Francisco Ry. v. Mills*, 271 U. S. 344, 348; *N. Y. C. R. Co. v. Ambrose*, 280 U. S. 486; *Baltimore & Ohio R. Co. v. Tindall*, 47 E. 2d 19; *Texas Gulf Sulphur Co. v. Portland Gas Light Co.*, 57 F. 2d 801. Cf. *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555, 566.

The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction "was so unusual, so contrary to the purpose" of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. *Milwaukee, etc. Ry. Co. v. Kellogg*, 94 U. S. 469, at 475:

"But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Events too remote to require reasonable prevision need not be anticipated. It was so held as to an intervening embargo after a delay in transit which was caused by negligence. *The Malcolm Baxter, Jr.*, 277 U. S. 323, 334. Cf. *Northern Ry. Co. v. Page*, 274 U. S. 65, 74; *St. Louis-San Francisco Ry. v. Mills*, *supra*. Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67. Here the rail was sufficient for ordinary use, and the carrier was not obliged to foresee and guard against misuse of the derailer, even though the misuse occurred as often as the evidence indicated. It was the wrongful use of the derailer that immediately occasioned the harm. Decedent had first closed and then opened the derailer on the first movement. He signalled the train to back into the storage track

just before the fatal accident. Although this misuse of the derailer was an act of negligence, it is mere speculation as to whether that negligence is chargeable to the decedent or another. Without this unexpected occurrence, the adequacy of the rail vis-a-vis a properly used derailer is unquestioned. It was entirely disconnected from the earlier act of the carrier in placing the weak rail in the track. The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.³

Affirmed.

³ See e. g., *The Squib Case*, 2 W. Bl. 892. Cf. 1 Cooley on Torts (4th Ed., 1932) § 50, n. 25, and collection of cases.

SUPREME COURT OF THE UNITED STATES.

No. 26.—OCTOBER TERM, 1943.

Irene Brady, Administratrix of the
Estate of Earle A. Brady, Deceased,
Petitioner,

vs.

Southern Railway Company.

On Writ of Certiorari to
the Supreme Court of
the State of North
Carolina.

[December 20, 1943.]

Mr. Justice BLACK, dissenting.

Twelve North Carolina citizens who heard many witnesses and saw many exhibits found on their oaths that the railroad's employees were negligent. The local trial judge sustained their finding. Four members of this Court agree with the local trial judge that the jury's conclusion was reasonable. Nevertheless five members of the Court purport to weigh all the evidence offered by both parties to the suit, and hold the conclusion was unreasonable. Truly, appellate review of jury verdicts by application of a supposed norm of reasonableness gives rise to puzzling results.¹

Although I do not agree that the "uniform federal rule" on directed verdicts announced by the Court correctly states the law I place my dissent on the ground that, whatever rule be applied, petitioner sufficiently alleged and proved at least two separate acts of negligence attributable to the respondent railroad

¹ For an enlightening exposition of the uncertainties generated by excessive judicial use of the norm of reasonableness, see Jackson, *Trial Practice in Accident Litigation* (1930) 15 *Cornell Law Quarterly*, 194 *et seq.* It was the writer's opinion that there was "a persistent, insidious, and plausible tendency toward uncertainty in everything that legal reasoning touches", and that this tendency was "easier to illustrate than to describe." Had today's decision then been available, it could well have been added to the several decisions which were used as illustrations. Likewise the criticism which the writer directed at these illustrative decisions is exactly applicable to what the Court today, by applying a legal doctrine misnamed "proximate cause", has done to the Federal Employers' Liability Act. For what it has done is to choose "between two lines of public policy. It could not think in the simple terms of the statutory command: it reverted to the complex legal reasoning involving a combination of principles and depending upon multiplied conditions which the statute tried to supersede."

but for which the decedent Brady would probably have escaped death. The first was the act of one of respondent's trainmen in negligently closing the derailler; the second, the act of respondent's maintenance crew in negligently keeping a defective rail opposite that derailler. Proof of either was sufficient in itself to support a jury verdict against respondent under the terms of the Federal Employers' Liability Act.²

Negligence in Closing Derailler. A contributing cause to decedent's death was that the derailler was in a closed position at the time the engineer backed the engine and four cars into it. That the derailler should have been open is not disputed. The evidence was sufficient to show that the employee who negligently closed the derailler must have been either the flagman, the conductor, or the decedent. The flagman expressly denied that he closed the derailler, but the conductor made no such denial. Petitioner, although deprived of decedent's testimony, did produce evidence from which the jury could find that it was not decedent who closed it. Testimony established that decedent knew of the existence and location of the derailler, that he was an experienced brakeman, and that he would be aware of the danger of riding a freight car over a closed derailler. From these facts the jury could find that decedent thought the derailler was open since he would not likely have signalled the train over a closed derailler at the peril of his own safety and protection. Cf. *Atchison, Topeka & Santa Fe Railway Co. v. Toops*, 281 U. S. 351, 356. A similar inference is not justified as regards the flagman and conductor for the evidence shows that at the time of the accident both were a half mile away and therefore were not imperiled by the decedent's signalling back the train and were not in a position to have prevented the signal.³

² "Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, . . . or other equipment." 35 Stat. 65, as amended; 53 Stat. 1404; U. S. C. Title 45, § 51.

³ Uncontradicted testimony showed that both the flagman and the conductor were under the duty to operate the derailler in switching operations when the train was long. Here the train was four hundred yards in length. The conductor admitted that he had operated the derailler once during the switching

Having thus brought forth evidence that one of respondent's employees negligently closed the derailer and that decedent was not that employee petitioner had proved a case for the jury. I cannot agree with the view apparently adopted by the Court that the petitioner was required to pin the negligence on a particular one of decedent's fellow employees. No such burden is imposed by the Federal Act. It provides merely that a railroad is liable "for . . . death resulting in whole or *in part* from the negligence of *any* of the . . . employees." (*Italics supplied.*)⁴

Negligence in keeping defective rail opposite derailer. There was evidence to show that the rail of the pass track opposite the derailer had been used for twenty-six years; that the top of the rail was decayed, rusty, badly worn, and thin; that with bare fingers metal slivers could easily be picked from both sides of the rail; and that some of the cross ties were old, not properly supported by ballast, and sloped toward the defective rail. Petitioner then offered expert evidence, contradicted by respondent's expert evidence, that the derailment would not have occurred but for this defective rail. The Court declines to give any effect whatever to all of this evidence on two stated grounds: (1) That the rail was suitable for ordinary use and the backing of the train improperly over the closed derailer was not "a danger reasonably to have been anticipated"; (2) That the "weak rail" was not the "proximate cause" of the death.

It is difficult to imagine how, except by sheer guessing, or by drawing upon some undisclosed superior fund of wisdom, the Court reaches the conclusion that respondent need not have foreseen that trains would be backed over the wrong end of closed derailleurs. The evidence of railroad men who had worked on railroads showed it was foreseeable. Doubtless judges know more about formal logic and legal principles than do brakemen, engineers, and divisional superintendents. I am not so certain that they know more about the danger of keeping a defective rail immediately opposite a derailer. The Divisional Superintendent of the Southern Railway Company, put on the stand by the respondent, testified that trains backed over closed derailleurs "very

operation, and that he had been in a place where he could have closed it before the engine and four cars backed into it. Not one of the conductor's fellow employees testified as to what the conductor was doing at the time when the derailer must have been closed.

⁴ See note 2, *supra*.

frequently." He himself had seen it happen "on 25 to 50 occasions." And undisputed evidence, including photographs, showed that respondent had foreseen this likelihood to the extent that the top of the derailer had a special groove to hold the flange of a wheel as it passed over the back of the derailer. That a train would ordinarily not be backed over a closed derailer except for the personal negligence of the train crew is not determinative of the issue of foreseeability. The standard of reasonable conduct may require the defendant to protect the plaintiff against "that occasional negligence which is one of the ordinary incidents of human life and therefore to be anticipated. . . ." And the mere fact that the negligence of the respondent in placing the weak rail in the track occurred several years before the accident does not establish that the subsequent injury was not foreseeable. The negligent conduct of respondent not only consisted of "placing the weak rail in the track"; it also consisted of keeping the "weak rail" there.

Nor is it easy to comprehend why the defective rail was not the "proximate cause" of the injury. It was the last "link in an unbroken chain of reasonably foreseeable events" which cost the employee his life. Surely this rail was the "proximate cause" if those words be used to mean an event which contributes to produce a result, which is the meaning Congress intended when it made railroads liable for the injury or death of an employee "due to" or "resulting in whole or in part from" the railroad's negligence.⁵ The record shows that two expert witnesses with many years of railroad experience testified that the accident was caused by the defective rail. That one of these witnesses on cross-examination stated the derailment would not have occurred "nine times out of ten" if there had been a sound rail hardly justifies a directed verdict against petitioner. The fact of causation is no different from any other fact and does not have to be proved with absolute certainty; ninety per cent certainty should suffice to make it an issue for the jury. That a sound rail would have given the deceased nine chances out of ten to escape death should be enough to give his family and the community the protection which the Act contemplates.

Mr. Justice DOUGLAS, Mr. Justice MURPHY, and Mr. Justice RUTLEDGE concur in this opinion.

⁵ Restatement of Torts § 302, Comment 1. See also Prosser on Torts (1941) § 37, p. 243.

⁶ See Note 2, *supra*.